Supreme Court, U.S.
FILED

011842 JUN 11 2002

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No. _____

In the Supreme Court of the United States

AMERICAN RELIABLE INSURANCE COMPANY,
AMERICAN BANKERS INSURANCE COMPANY OF FLORIDA,
AND CAMPBELL INSURANCE SERVICES, INC.,
Petitioners,

v.

ROBERT STILLWELL AND HELEN STILLWELL,
Respondents.

On Petition for Writ of Certiorari to the
Supreme Court of Appeals of West Virginia

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the State of West Virginia is required by the Federal Arbitration Act, 9 U.S.C. §§ 1 *et seq.* (the "FAA"), and the Supremacy Clause of the Constitution of the United States, to provide an immediate appeal from a trial court's order denying a motion to compel arbitration of a dispute governed by the FAA.

2. Whether the Supreme Court of Appeals of West Virginia erred in failing to reverse the trial court's order which refused to compel arbitration pursuant to the FAA based on grounds that (i) the FAA does not apply, and (ii) the arbitration provision was unenforceable because it was not separately "bargained for."

PARTIES

Petitioners:

American Reliable Insurance Company, American Bankers Insurance Company of Florida, and Campbell Insurance Services, Inc.

Respondents:

Robert Stillwell and Helen Stillwell.

RULE 29.6 STATEMENT

American Reliable Insurance Company and American Bankers Insurance Company of Florida are wholly owned subsidiaries of American Bankers Insurance Group, Inc., which is an indirect wholly owned subsidiary of Fortis, Inc. No publicly held company owns 10% or more of the stock of American Bankers or American Reliable. Campbell Insurance Services, Inc. is privately owned, and no parent corporation or publicly held company owns 10% or more of its stock.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners, American Reliable Insurance Company ("American Reliable"), American Bankers Insurance Company of Florida ("American Bankers"), and Campbell Insurance Services, Inc. ("Campbell"), respectfully petition for a writ of certiorari to review a 3 to 2 decision by the Supreme Court of Appeals of West Virginia which held that West Virginia is not required to provide an immediate interlocutory appeal of an order denying a motion to compel arbitration and stay judicial proceedings under the FAA. As a result, the State of West Virginia (along with four other states) continues to completely frustrate the purpose and intent of the FAA by forcing parties to suffer the time and expense of a full blown trial on the merits in state court, preceded by the full array of civil discovery devices, before obtaining any appellate review of even the most frivolous of state trial court decisions denying the right to compel arbitration or stay judicial proceedings under the FAA. As discussed in more detail below, the decision of the West Virginia Supreme Court (i) directly conflicts with this Court's decision in *Southland Corp. v. Keating*,[1] (ii) is directly contrary to Section 16(a)(1)(A) and (B) of the FAA, and (iii) conflicts with the laws of over 40 other states which properly provide an immediate appeal of an order denying arbitration under the FAA.

OPINIONS BELOW

The original order of the Circuit Court of Ohio County, West Virginia (the "trial court"), which denied the Petitioners' motion to compel arbitration, is not reported (App.,

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[1] *Southland Corp. v. Keating*, 465 U.S. 1 (1984).

infra, 1a-2a). Also unreported is the trial court's subsequent order denying the Petitioners' motion to certify the earlier ruling for interlocutory appeal to the West Virginia Supreme Court of Appeals (App., *infra*, 3a-7a). The Supreme Court of Appeals of West Virginia issued three relevant orders, all of which are unreported: an order denying Petitioners' Petition for Writ of Prohibition (App., *infra*, 8a-10a); an order denying Petitioners' Petition for Appeal (App., *infra*, 11a-12a); and an order denying Petitioners' motion for rehearing of the denial of its Petition for Appeal (App., *infra*, 13a-15a).

JURISDICTION

The order of the Supreme Court of Appeals of West Virginia denying the Petition for Appeal was entered on January 10, 2002 (App., *infra*, 11a-12a). A subsequent order denying Petitioners' motion for rehearing was entered by the Supreme Court of Appeals of West Virginia on March 13, 2002 (App., *infra*, 13a-15a).

This Court has jurisdiction under 28 U.S.C. § 1257 and *Southland Corp. v. Keating*, 465 U.S. 1, 6-8 (1984), which held that the Court has jurisdiction under *Cox Broadcasting v. Cohn*, 420 U.S. 469 (1975) to review the decision of a state's highest court which "seriously erode[s] federal policy" with respect to arbitration rights under the FAA. *Southland Corp.*, 465 U.S. at 7 ("the failure to accord immediate review of the decision of the California Supreme Court might 'seriously erode federal policy'" under the FAA); *id.* at 6 ("[w]ithout immediate review of the California holding by this Court there may be no opportunity to pass on the federal issue"); *id.* at 7-8 ("For us to delay review of a state judicial decision denying enforcement of the contract to arbitrate until the state court litigation has run its

course would defeat the core purpose of a contract to arbitrate.").[2]

This case involves an important federal issue under the FAA which has been finally decided by a state court of last resort and which, if not immediately reviewed, will continue to undermine and frustrate the purpose and intent of the FAA in violation of the Supremacy Clause. Without immediate review "there may be no opportunity to pass on the federal issue" and, as a result, West Virginia (and four other states, *see infra* note 4) will continue effectively to nullify federal rights under the FAA.[3]

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Supremacy Clause of the Constitution of the United States provides in relevant part:

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[2] *See also Doctor's Associates, Inc. v. Casarotto*, 517 U.S. 681, 683-84 (1996) (granting certiorari to review decision of Montana Supreme Court holding state statute which rendered arbitration clause unenforceable was not preempted by FAA); *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 269 (1995) (petition for writ of certiorari granted to review Alabama Supreme Court's holding that FAA did not apply due to insufficient contacts with interstate commerce).

[3] *Southland*, 465 U.S. at 6. This is also a situation in which the federal issue continues to arise, yet repeatedly evades review, and may disappear here if the Petitioners prevail in the state court "on the merits on nonfederal grounds, thus rendering unnecessary review of the federal issue by this Court." *Id.* (quoting *Cox*, 420 U.S. at 483).

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; ... shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

U.S. Const. Art. VI, cl. 2.

The Federal Arbitration Act, 9 U.S.C. §§ 1, *et seq.*, provides, in relevant part:

> A written provision in any … contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction … shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract. (9 U.S.C. § 2).
>
> * * *
>
> If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is

not in default in proceeding with such arbitration. (9 U.S.C. § 3).

* * *

An appeal may be taken from –

(1) an order –

(A) refusing a stay of any action under section 3 of this title,

(B) denying a petition under section 4 of this title to order arbitration to proceed .... (9 U.S.C. § 16(a)(1)(A) and (B)).

STATEMENT OF THE CASE

This is a case in which the Petitioners tried in vain to obtain review of a plainly erroneous trial court ruling which denied their motion to compel arbitration and to stay judicial proceedings pursuant to the Federal Arbitration Act, 9 U.S.C. §§ 1, *et seq*. The degree of frivolity with which a state trial court disregards federal rights under the FAA is, however, irrelevant in West Virginia, because West Virginia is one of five states which simply does not provide a right to interlocutory appeal of an order denying a motion to compel arbitration.[4] As a result, directly contrary to this Court's

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[4] The other four states which deny such a right are Connecticut (*see Success Centers, Inc. v. Huntington Learning Centers, Inc.*, 613 A.2d 1320 (Conn. 1992) (holding no appeal of denial of motion brought under Conn. Gen. Stat. § 52-409)); Delaware (*see Signal One LLC v. Signal Capital Corp.*, 760 A.2d 163, 163 (Del. 2000) (denying appeal as interlocutory)); Oregon (*see Bush v. Paragon Property, Inc.*, 997 P.2d 882, 887 (Ore. Ct. App. 2000) (holding court did not have jurisdiction to entertain appeal)); and Texas (*see*

(continued...)

decision in *Southland*, which cogently explained why an immediate appeal is necessary to prevent the derogation of Congress' objectives, West Virginia not only frustrates the federal policy embodied in the FAA, but encourages its trial courts to ignore the very existence of the FAA and controlling arbitration decisions of this Court.

A. Material Facts

The Respondents (the "Stillwells") are residents of the State of West Virginia who entered into a contract with Petitioner American Reliable, an Arizona insurance company, to insure property located in Ohio. The Stillwells allege that Campbell, an Ohio company, is the general agent of American Reliable and that American Bankers, a Florida company, was involved in the adjustment of their claim for insurance benefits under the contract. The insurance contract contained an arbitration provision which provided in part as follows:

> Any and all disputes, controversies or claims of any kind and nature between you and us arising out of or in any way related to the validity, interpretation, performance or breach of any provisions of this policy, and upon which a settlement has not been reached by you and us, shall be resolved exclusively, by arbitration in accordance with the Federal Arbitration Act (9 U.S.C. § 1 ET SEQ).

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[4] (...continued)
Anglin v. Tipps, 842 S.W.2d 266, 272 (Tex. 1992) (holding that there is no immediate right to appeal where contract is governed by the FAA)).

App., *infra*, 16a-17a. After a dispute arose over the benefits payable under the contract, the Stillwells filed suit in West Virginia state court against American Reliable, Campbell, and others. Approximately thirteen months later, the state court allowed the Stillwells to amend their complaint to convert their case into a "class action" and to add American Bankers as a defendant. On May 1, 2001, all of the Petitioners moved in the trial court to stay judicial proceedings and compel arbitration pursuant to the FAA.

B. Trial Court Orders

On June 11, 2001, the West Virginia trial court denied the Petitioners' motion to compel arbitration and to stay judicial proceedings. App., *infra*, 1a-2a (the "Arbitration Order"). The only reason given in the Arbitration Order for denying arbitration was that the arbitration provision was not separately "bargained for" under West Virginia law. Thus, directly contrary to black letter law under the FAA, the trial court decided to discriminate outright against the arbitration provision by treating it differently than all of the other provisions in the contract. *See infra* p. 18.

On August 6, 2001, the Petitioners filed with the trial court a motion to certify the Arbitration Order to the Supreme Court of Appeals of West Virginia for interlocutory appeal pursuant to West Virginia Code § 58-5-2 (the "Motion for Certification"). At the August 30, 2001 hearing on that motion, counsel for the Petitioners also requested reconsideration of the Arbitration Order. *See* App., *infra*, 4a.

By order entered on October 1, 2001, the trial court denied the Motion for Certification. App., *infra*, 3a-7a. For the first time, the trial court revealed that it was ignoring the FAA

and that it "ha[d] decided that the Federal Arbitration Act does not apply to this action." App., *infra*, 4a.

C. Petition For Writ Of Prohibition

On September 27, 2001, Petitioners filed a Petition for Writ of Prohibition with the Supreme Court of Appeals of West Virginia. The Petition pointed out that, given the undisputed involvement of parties from four different states, there was no question that interstate commerce was involved and that the FAA governed this dispute. *See, e.g., Allied-Bruce Terminix*, 513 U.S. at 277. The Petition for Prohibition also argued, among other things, that the trial court's Arbitration Order was directly contrary to the FAA, and that the West Virginia Supreme Court was required to grant an appeal on the merits under the FAA. In a 3-2 decision, the Supreme Court of Appeals of West Virginia denied the petition on October 24, 2001. App., *infra*, 8a-10a. The Order noted that "Justices Davis and Maynard would grant the petition for a writ of prohibition on the basis that ***federal law would compel arbitration***." App., *infra*, 9a. (emphasis added).

D. Petition For Appeal

Because the mechanism for appealing an order denying arbitration was unclear under West Virginia law, on October 10, 2001, Petitioners also filed a Petition for Appeal, as an alternative to its Petition for Writ of Prohibition, arguing once again that the trial court's Arbitration Order violated the FAA and that the FAA guarantees a right of immediate appeal. The Supreme Court of Appeals of West Virginia denied the Petition for Appeal on January 10, 2002. App., *infra*, 11a-12a. The Petitioners moved for reconsideration.

On March 13, 2002, the Supreme Court of West Virginia denied Petitioners' motion for rehearing in another 3 to 2 decision. App., *infra*, 13a-15a. The Court also stayed the trial court proceedings for 90 days pending the filing of this Petition for Writ of Certiorari with this Court. App., *infra*, 14a-15a.

REASONS FOR GRANTING THE PETITION

The Federal Arbitration Act was originally enacted in 1925 "to reverse the longstanding judicial hostility to arbitration agreements." *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 24 (1991). Today, over 75 years later, that same judicial hostility is alive and well, and living in the State of West Virginia. In *Southland Corp. v. Keating*, 465 U.S. 1, 7-8 (1984), this Court expressly held in the context of its jurisdictional analysis that the failure to provide an immediate appeal of an order denying arbitration would "defeat the core purpose of a contract to arbitrate." But more than 15 years later, West Virginia refuses to provide such an appeal, notwithstanding the detrimental effect on a declared federal policy designed to strongly favor arbitration. Not only does the West Virginia decision directly conflict with this Court's decision in *Southland*, but it is contrary to Section 16(a)(1) of the FAA, which expressly provides for a right to appeal the denial of a motion to compel arbitration or to stay judicial proceedings, and it departs from the law of over 40 other states which have implemented appellate procedures consistent with Section 16 of the FAA. *See infra* notes 6 & 7.

In enacting the FAA, "Congress declared a national policy favoring arbitration and withdrew the power of the states to require a judicial forum for the resolution of claims which the contracting parties agreed to resolve by arbitration." *Southland Corp.*, 465 U.S. at 10. The FAA "is a congressional declaration

of a liberal federal policy favoring arbitration agreements, notwithstanding any state substantive ***or procedural policies*** to the contrary." *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983) (emphasis added). "[T]he basic purpose of the [FAA] is to overcome courts' refusals to enforce agreements to arbitrate," *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 270 (1995), and "to reverse the longstanding judicial hostility to arbitration agreements." *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 24 (1991). The FAA reflects a "statutory policy of ***rapid and unobstructed enforcement*** of arbitration agreements." *Moses H. Cone Mem'l Hosp.*, 460 U.S. at 23 (emphasis added). This Court has repeatedly held that state laws which conflict with the purposes of the FAA are improper and preempted by federal law. *See, e.g., Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681, 688-89 (1996) (reversing Montana Supreme Court and holding state statute preempted by FAA); *Allied-Bruce Terminix Cos.*, 513 U.S. at 271-72 (explaining that the FAA "pre-empts state law" and reversing Alabama Supreme Court decision refusing to enforce arbitration agreement); *Southland Corp.*, 465 U.S. at 16-17 (reversing California Supreme Court and holding state franchise law preempted under the Supremacy Clause).

In addition, Section 16 of the FAA guarantees the right to an immediate interlocutory appeal of an order refusing to stay judicial proceedings pending arbitration, 9 U.S.C. § 16(a)(1)(A). The West Virginia Supreme Court's refusal to provide Petitioners with an immediate appeal pursuant to the FAA conflicts with the highest courts of other states that have found they are bound to follow the procedural requirements of Section 16. *See, e.g., Long v. Industrial Dev. Bd.*, 619 So. 2d 1387, 1388 (Ala. 1993) ("In cases where the Federal Arbitration Act is applicable, 9 U.S.C. § 16 allows an appeal

from a denial of a motion to compel arbitration."); *A.G. Edwards & Sons, Inc. v. Clark*, 558 So. 2d 358, 360 (Ala. 1990) (same); *VCW, Inc. v. Mutual Risk Management, Ltd.*, 46 S.W.3d 118, 121-22 (Mo. Ct. App. 2001) ("in determining our jurisdiction to hear this appeal, we are obliged to apply 9 U.S.C. § 16(a)(1)(A), which allows the appellants to appeal the denial of their motion for a stay") (citing *Bunge Corp. v. Perryville Feed & Produce, Inc.*, 685 S.W.2d 837, 838-39 (Mo. 1985)); *Kelley v. Benchmark Homes, Inc.*, 550 N.W.2d 640, 642 (Neb. 1996) (appeal was before the court "as an interlocutory appeal pursuant to the [FAA]"); *see also Dakota Wesleyan Univ. v. HPG Int'l, Inc.*, 560 N.W.2d 921, 922-24 (S.D. 1997) (applying FAA and dismissing appeal because FAA does not permit immediate appeals of orders compelling arbitration). There is a direct conflict on this issue not only between these states and West Virginia, but also between these states and Connecticut, Delaware, Oregon, and Texas. *See infra* note 4. This Court should grant this Petition so that it may resolve this conflict and eliminate the lack of uniformity between these five minority states and the vast majority of other jurisdictions. *See infra* notes 6 & 7 and accompanying text..

This Court should also grant this Petition because, in violation of the FAA and this Court's prior decisions, West Virginia courts are failing to enforce arbitration clauses unless they are separately "bargained for." *See* Arbitration Order, App., *infra*, 1a-2a at ¶ 3 (citing *Board of Educ. of the County of Berkeley v. W. Harley Miller, Inc.*, 236 S.E.2d 439 (1977)).[5]

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[5] The trial court mistakenly cited to an earlier 1975 decision in the same case (*Board of Educ. of the County of Berkeley v. W. Harley Miller, Inc.*, 221 S.E.2d 882 (1975)), which did not discuss West Virginia's "bargained-for" doctrine. There is no dispute among the

(continued...)

This Court thus should grant this Petition as it did in *Doctor's Associates, Inc. v. Casarotto*, 517 U.S. 681, 682 (1996) where it held that arbitration provisions must be placed "upon the same footing as other contracts."

I. The Decision By The Supreme Court Of Appeals Of West Virginia To Deny An Immediate Appeal Of An Order Refusing To Compel Arbitration And To Stay Judicial Proceedings Violates The Federal Arbitration Act And Conflicts With Decisions Of This Court And Those Of Other State Supreme Courts

A. The Federal Arbitration Act Applies To The Arbitration Provision In The Insurance Contract

Two of the five justices on the Supreme Court of Appeals of West Virginia recognized that "federal law would compel arbitration" in this case, App., *infra*, 10a, but the majority refused to provide any appeal of the trial court's refusal to apply the FAA.

As a matter of law, there is no question that the FAA is applicable to this dispute. The FAA applies to any written contract which *involves* interstate commerce and includes an arbitration clause. 9 U.S.C. §§ 1-2; *Allied-Bruce Terminix Cos.*, 513 U.S. at 277 ("the word 'involving' . . . signals an intent to exercise Congress' commerce power to the full"). After this Court's decision in *United States v. South-Eastern*

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[5] (...continued)
parties that the trial court intended to cite to the 1977 decision in *Board of Education of the County of Berkeley*.

Underwriters Ass'n, 322 U.S. 533 (1944), it has been firmly established that insurance transactions involve commerce and are subject to federal regulation under the Commerce Clause. *See also Securities & Exchange Comm'n v. National Sec., Inc.*, 393 U.S. 453, 458 (1969).

The transactions at issue here involve interstate commerce because the parties are from four different states. *See Rollins, Inc. v. Foster*, 991 F. Supp. 1426, 1430 (M.D. Ala. 1998) (the requirement of interstate commerce is met where plaintiff is a resident of one state and defendant is incorporated in and has its principal place of business in another state). Moreover, the arbitration clause itself expressly states that it is subject to the FAA. When the arbitration clause itself acknowledges the FAA, a court will enforce the parties' agreement to apply federal law. *Staples v. Money Tree*, 936 F. Supp. 856, 858 (M.D. Ala. 1996) ("the court must . . . enforce the stipulation and apply the FAA to the arbitration agreement contained in the contract"). In sum, there was no legitimate justification, rationale, or arguable basis for the trial court's blatant disregard of the FAA in this case, and West Virginia's refusal to provide an appeal from these types of decisions encourages nonadherence to federal policy throughout the state, destroys uniformity amongst states, and seriously undermines the purpose and effectiveness of the FAA.

B. This Court Should Grant The Petition To Clarify That State Courts Are Bound By The Supremacy Clause And Section 16 Of The FAA To Provide A Right To An Immediate Appeal Of A Court's Order Denying A Motion To Compel Arbitration Or To Stay Judicial Proceedings Under The FAA

Section 16 of the FAA guarantees the right to an immediate appeal from an order denying a motion to compel arbitration or an order denying a stay of judicial proceedings pending arbitration. *See* 9 U.S.C. §§ 16(a)(1)(A), (B) (appeals may be taken from an order denying a stay of any action under Section 3 of the FAA or a petition to order arbitration under Section 4 of the FAA). Most states have adopted rules of appellate procedure or statutes which similarly provide the right to an immediate appeal of an order denying arbitration.[6] In other states, case law interpretations of general statutes or rules

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[6] *See, e.g.*, Ala. R. App. P. 4(d); Alaska Stat. § 09.43.160; Ariz. Rev. Stat. Ann. § 12-2101.01; Ark. R. App. P. 2(a)(12); Cal. Civ. Proc. Code § 1294; Colo. Rev. Stat. Ann. § 13-22-221; D.C. Code § 16-4317; Fla. R. App. P. 9.130(a)(3)(C)(iv); Idaho Code § 7-919; Ind. Code Ann. § 34-57-2-19; Iowa Code Ann. § 679A.17; Kan. Stat. Ann. § 5-418; Ky. Rev. Stat. Ann. § 417.220; Me. Rev. Stat. Ann. tit. 14, § 5945; Mass. Gen. Laws Ann. ch. 251, § 18; Minn. Stat. Ann. § 572.26; Mo. Ann. Stat. § 435.440; Mont. Code Ann. § 27-5-324; Neb. Rev. Stat. § 25-2620; Nev. Rev. Stat. Ann. § 38.205; N.M. Stat. Ann. § 44-7A-29; N.D. Cent. Code § 32-29.2-19; Ohio Rev. Code Ann. § 2711.02; Okla. Stat. Ann. Tit. 15, § 817; 42 Pa. Cons. Stat. Ann. § 7320; S.C. Code Ann. § 15-48-200; S.D. Codified Laws § 21-25A-35; Tenn. Code Ann. § 29-5-319; Tex. Civ. Prac. & Rem. Code Ann. § 171.098; Utah Code Ann. § 78-31a-19; Vt. Stat. Ann. tit. 12, § 5681; Va. Code Ann. § 8.01-581.016; Wyo. Stat. Ann. § 1-36-119.

provide this right.[7] Still other states have held that the FAA's provisions concerning a right to interlocutory appeal are applicable or directly binding in state court proceedings. *See supra* pp. 10-11.

The law in all of the above states, representing the vast majority of jurisdictions, uniformly reflects that the immediate review of an order denying a motion to compel arbitration or to stay judicial proceedings is required to safeguard the right to arbitrate by ensuring that a party is not required to litigate an

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[7] *See, e.g., Choate Constr. Co. v. Ideal Elec. Contractors, Inc.*, 541 S.E.2d 435, 436 (Ga. Ct. App. 2000) (order denying motion to compel arbitration is directly appealable under Ga. Stat. Ann. § 5-6-34(b)); *Association of Owners of Kukui Plaza v. Swinterton & Walberg Co.*, 705 P.2d 28, 35 (Haw. 1985) (denial of motion to compel arbitration is appealable as contemplated by Haw. Rev. Stat. § 641-1(b)); *Notaro v. Nor-Evan Corp.*, 456 N.E.2d 93, 94-95 (Ill. 1983) (denial of motion to compel arbitration is immediately appealable under Supreme Court Rule 307(a)(1) as analogous to denial of injunctive relief); *Thomas v. Desire Community Housing Corp.*, 773 So. 2d 755, 759 (La. Ct. App. 2000); *Regina Constr. Corp. v. Envirmech Contracting Corp.*, 565 A.2d 693, 696 (Md. Ct. Spec. App. 1989) (interpreting Md. Cts. & Jud. Proc. § 12-303); *DeCaminada v. Coopers & Lybrand, L.L.P.*, 591 N.W.2d 364, 366 (Mich. Ct. App. 1999) (granting leave to appeal denial of motion brought under MCR 2.116(C)(7)); *Smith Barney, Inc. v. Henry*, 775 So. 2d 722, 724 (Miss. 2001) (discretionary appeal permitted under Miss. R. App. P. 5(a)); *Grasser v. United Healthcare Corp.*, 778 A.2d 521, 522 (N.J. Super. Ct. App. Div. 2001) (discretionary appeal permitted under N.J. R. App. P. 2:2-4); *Flanagan v. Prudential-Bache Securities, Inc.*, 495 N.E.2d 345, 347 n.* (N.Y. 1986); *Prime South Homes, Inc. v. Byrd*, 401 S.E.2d 822, 825 (N.C. 1991); *Herzog v. Foster & Marshall, Inc.*, 783 P.2d 1124, 1126-28 (Wash. 1989) (applying Wash. R. App. P. 2.2).

entire dispute before entitlement to arbitration is determined. *See Stedar Enterprises Ltd. v. Armtex, Inc.*, 947 F.2d 727, 730 (4th Cir. 1991) (Section 16 ensures that "a party who believes that arbitration is required by an agreement between the parties need not suffer the expense and inconvenience of litigation before receiving appellate review of a district court judgment that arbitration was inappropriate."); David D. Siegel, PRACTICE COMMENTARY: APPEALS FROM ARBITRABILITY DETERMINATIONS, 9 U.S.C.A. § 16 (West Supp. 1997) (explaining that the lack of an immediate appeal from a denial of a motion to compel arbitration would "frustrate" the purpose of the FAA because "the whole substantive dispute would then have to go through ordinary litigation, which could take years, only to have whatever judgment it produced overturned on appeal if and when, at last, a court of appeals were to address the arbitrability point as part of its review of the final judgment, and to reverse the decision and uphold arbitrability"). Indeed, this Court has explained that the right to arbitrate would be eviscerated if it were not vindicated until after the case is tried:

> [T]o delay review of a state judicial decision denying enforcement of the contract to arbitrate until the state court litigation has run its course ***would defeat the core purpose of a contract to arbitrate.***

Southland Corp., 465 U.S. at 7-8 (emphasis added).

Because the Supreme Court of Appeals of West Virginia has interpreted West Virginia law in a manner which conflicts with and frustrates the objectives of federal law, West Virginia's interpretation of its own law is preempted by the FAA and prohibited by the Supremacy Clause. *See Volt*

Information Sciences, Inc. v. Board of Trustees, 489 U.S. 468, 477 (1989) (the FAA preempts state law to the extent the state law "actually conflicts with federal law -- that is, to the extent that it 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress'") (quoting *Hines v. Davidowitz,* 312 U.S. 52, 67 (1941)). A state may not apply its own procedural rules if those procedures will defeat the objectives of the federal law. *See, e.g, Felder v. Casey,* 487 U.S. 131, 138 (1988) ("[W]here state courts entertain a federally created cause of action, the 'federal right cannot be defeated by the forms of local practice.'") (quoting *Brown v. Western R. Co. of Ala.*, 338 U.S. 294, 296 (1949)); *see also Southern Cal. Edison Co. v. Peabody Western Coal Co.*, 977 P.2d 769, 773-74 (Ariz. 1999) ("Each state is free to apply its own procedural requirements so long as those procedures do not defeat the purposes of the [FAA]").

In this case, the lack of an immediate appeal is not "consistent with the goals of the [FAA]," and would "stand as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Felder,* 487 U.S. at 138 (quoting *Perez v. Campbell*, 402 U.S. 637, 649 (1971)). "[T]he purpose of the [FAA] was 'to relieve congestion in the courts and to provide the parties with an alternative method for dispute resolution that would be speedier and less costly than litigation.'" *Gianelli Money Purchase Plan & Trust v. ADM Investor Servs.,* 146 F.3d 1309, 1312 (11th Cir. 1998) (citation omitted). The right guaranteed by the FAA is the right to avoid the time and expense associated with litigation. *See Gilmer,* 500 U.S. at 31 (purpose of FAA is to promote the "simplicity, informality, and expedition of arbitration"); *Southland,* 465 U.S. at 8 (purpose of arbitration is to avoid expense and delay associated with litigation). As explained above, Section 16

safeguards the right to arbitrate by ensuring that a party is not required to litigate an entire dispute before entitlement to arbitration is resolved.

The failure to grant the immediate review guaranteed by Section 16 would thwart the Petitioners' right to the speedy and less costly form of dispute resolution provided in the arbitration agreement and would defeat the core purpose of the FAA. Because it would directly conflict with and would frustrate a substantive right created by federal law, any interpretation or application of West Virginia law which does not provide for a right to appeal an order denying a motion to compel arbitration would be preempted by federal law under the Supremacy Clause. *See Volt*, 489 U.S. at 477; *Felder*, 487 U.S. at 138. For all of these reasons, this Court should grant the Petition to resolve the conflict between West Virginia and other states, to protect the federal rights guaranteed by the FAA, and to unify West Virginia with the vast majority of other states which operate consistent with Section 16 of the FAA.

II. This Court Should Grant The Petition To Eliminate The Conflict Between Prior Decisions Of This Court And West Virginia's Refusal To Apply The FAA And Its Failure To Compel Arbitration Under A "Bargained-For" Doctrine

In enacting the FAA, Congress established a strong policy in support of arbitration agreements, requiring that courts "rigorously enforce agreements to arbitrate." *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220, 226 (1987) (citation omitted); *accord Green Tree Fin. Corp.-Ala. v. Randolph*, 531 U.S. 79, 81 (2000) (FAA established a "liberal federal policy favoring arbitration agreements"); *Doctor's Assocs., Inc.*, 517 U.S. at 685 (FAA established a

"broad principle of enforceability"); *Perry v. Thomas,* 482 U.S. 483, 489 (1987) (FAA "is a congressional declaration of a liberal federal policy favoring arbitration agreements").

The FAA provides that arbitration provisions "shall be ***valid, irrevocable, and enforceable***, save upon such grounds as exist at law or in equity for the revocation of any contract." *Smith Barney, Inc. v. Critical Health Sys. of North Carolina*, 212 F.3d 858, 861 (4th Cir. 2000) (emphasis added); 9 U.S.C. § 2. The FAA "establishes that, as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved ***in favor of arbitration***, whether the problem at hand is the construction of the contract language itself or . . . [a] defense to arbitrability." *Moses H. Cone Mem'l Hosp.*, 460 U.S. at 24-25 (emphasis added).

Under the FAA, this Court has repeatedly emphasized that one of the fundamental purposes of the FAA was to put arbitration clauses upon an ***equal footing*** as the other clauses of a contract. *Doctor's Assocs., Inc.*, 517 U.S. at 682 (arbitration provisions must be placed "upon the same footing as other contracts") (quoting *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 511 (1974)). In *Allied-Bruce Terminix Cos.*, this Court made this principle very clear:

> States may regulate contracts, including arbitration clauses, under general contract law principles and they may invalidate an arbitration clause 'upon such grounds as exist at law or in equity for the revocation of ***any*** contract.' 9 U.S.C. § 2 (emphasis added). ***What States may not do is decide that a contract is fair enough to enforce all its basic terms (price, service, credit),***

> ***but not fair enough to enforce its arbitration clause.*** The Act makes any such state policy unlawful, for that kind of policy would place arbitration clauses on an unequal 'footing,' directly contrary to the Act's language and Congress' intent.

513 U.S. at 281 (emphasis added).

In this case, the West Virginia trial court made unjustifiable errors of law under the FAA which require reversal. It did exactly what the FAA and this Court's precedent prohibit – singling out the arbitration provision in the contract for discriminatory treatment and refusing to enforce the arbitration clause, but at the same time allowing the Stillwells to enforce all of the other provisions of the contract. *See Doctor's Assocs.*, 517 U.S. at 682; *Allied-Bruce Terminix Cos.*, 513 U.S. at 281. Specifically, the trial court reasoned that "[a]greements to arbitrate will be enforced in West Virginia only if they are bargained for," and "[t]he arbitration clause in the Plaintiffs' insurance contract was not bargained for by the plaintiffs." App., *infra*, 1a at ¶¶ 1-2. The trial court's disparate treatment of the arbitration provision is impermissible under the FAA and requires reversal. If the contract as a whole was supported by adequate consideration, the contract was bargained for, and absent special circumstances all of its provisions should be enforced in an equitable manner. The FAA and this Court's precedents prohibit heightened scrutiny of an arbitration clause designed to destroy its enforceability. This Court should grant the Petition to declare West Virginia's treatment of the arbitration clause here unlawful under the FAA.

Separately, the Petition should be granted to clarify that, under the FAA, a state court errs when it applies a presumption *against* enforcement of an arbitration provision by requiring the party seeking enforcement to come forward with *evidence* that the arbitration clause was separately bargained for. App., *infra*, 2a, ¶ 4 ("Defendants proffered no evidence that the parties to this contract knowingly bargained for an arbitration clause."). This requirement improperly shifts the burden of proof and turns the strong presumption in favor of arbitration on its head. *See, e.g., Moses H. Cone Mem'l Hosp.*, 460 U.S. at 24-25 (FAA "establishes that, as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved ***in favor of arbitration***, whether the problem at hand is the construction of the contract language itself or [a] . . . defense to arbitrability") (emphasis added).

In sum, the Petition should also be granted to eliminate the conflict between West Virginia law and decisions of this Court which hold that the FAA applies to contracts involving interstate commerce, and that the FAA preempts principles of state law (like West Virginia's "bargained for" doctrine) which discriminate against arbitration clauses.

CONCLUSION

The Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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Counsel for Petitioner American Bankers Insurance Company of Florida

JUNE 11, 2002

APPENDIX A

IN THE CIRCUIT COURT OF OHIO COUNTY,
WEST VIRGINIA

ROBERT STILLWELL, ET AL,	)	
Plaintiffs	)	
Vs	)	NO. 00-C-116W
AMERICAN RELIABLE INSURANCE COMPANY, ET AL,	)	
Defendants	)	

ORDER

The above-entitled cause came before the Court on Defendants' motion requesting that this Court compel arbitration and stay this proceeding pursuant to 9 U.S.C. §1 *et seq*. of the Federal Arbitration Act.

The facts necessary to the determination of this motion appear to be the following:

1. The arbitration clause in the Plaintiffs' insurance contract was not bargained for by the Plaintiffs.

2. Agreements to arbitrate will be enforced in West Virginia only if they are bargained for.

3. The question of whether an arbitration provision is "bargained for" must, in order to make arbitration workable, always be a matter of law for the Court to determine and never a question of fact. Bd. of Ed. of

Berkeley Co. v. W. Harley Miller, Inc., 159 W. Va. 120, 221 S.E.2d 882 (1975).

4. An insurance contract is a contract of adhesion and Defendants proffered no evidence that the parties to this contract knowingly bargained for an arbitration clause.

On this showing the Defendants have not established a right to compel arbitration. It is therefore

ORDERED that the Defendants' Motion to Compel Arbitration and Stay Judicial Proceedings is denied.

ENTER this 11 day of June, 2001:

/s/ Ronald E. Wilson
Ronald E. Wilson, Judge

APPENDIX B

IN THE CIRCUIT COURT OF
OHIO COUNTY, WEST VIRGINIA

ROBERT STILLWELL and HELEN STILLWELL, individually and on behalf of all others similarly situated,	)	
Plaintiffs,	)	
v.	)	NO. 00-C-116W
AMERICAN RELIABLE INSURANCE COMPANY, *et al.*,	)	
Defendants.	)	

ORDER

On the 30th day of August, 2001, there appeared the plaintiffs, by their counsel, Thomas C. Schultz, and Don A. Yannerella; also appeared defendant, American Bankers Insurance Company of Florida, by its counsel, John Preston Bailey and Markham R. Leventhal; also appeared defendant, American Reliable Insurance Company and Campbell Insurance Services, Inc., by their counsel, Kevin S. Burger; also appeared defendant, Berry, Bippus, Chison & Foose, Inc., by its counsel, Susan K. Dirks; and also appeared defendant, Cunningham Lindsey U.S., Inc., by its counsel, Mark E. Kinley.

Whereupon, the Court having first reviewed the memoranda that were filed, then proceeded to hear arguments of counsel on the following issues and made the following rulings:

1. With respect to the motion of American Reliable, American Bankers, and Campbell Insurance Services for certification, pursuant to W. Va. Code § 58-5-2, of the Court's June 11, 2001 order denying the motion to compel arbitration, it is **ORDERED** that said motion for certification is hereby **DENIED**. The Court agrees that the order denying arbitration entered on June 11, 2001, is appealable by writ of prohibition or by direct appeal under W. Va. Code § 58-5-1, but the Court declines to certify an appeal under § 58-5-2 because such certification would result in a stay of discovery which the Court is reluctant to grant. The Court advised defendants that they can petition to appeal the arbitration order and can request a stay directly from the West Virginia Supreme Court of Appeals pending any such appellate proceeding. Counsel for American Bankers orally requested reconsideration of this Court's June 11, 2001 order, or a stay pending appeal and tendered during oral argument for the Court's consideration a copy of the U.S. Court of Appeals' decision in Bradford-Scott Data Corp. v. Physician Computer Network, 128 F.3d 504 (7th Cir. 1997) relating to a stay of proceedings pending an appeal of the denial of a motion to compel arbitration. The Court has decided that the Federal Arbitration Act does not apply to this action, and the Court declines to reconsider its June 11, 2001 order. The Court's opinion with respect to the applicability of the Bradford-Scott decision and the request for a stay is set forth in the Court's Letter Opinion dated August 30, 2001, a copy of which is appended to this Order.

The objections and exceptions of all parties to any adverse ruling or order contained herein are noted and saved.

The Clerk shall enter the foregoing and shall mail attested copies of this Order to: (1) Thomas C. Schultz, Esquire,

McLain Building, Ste. 333, 40 - 12th Street, Wheeling, WV 26003; (2) Don A. Yannerella, Esquire, 403 Board of Trade Building, 80 - 12th Street, Wheeling, WV 26003; (3) Kevin S. Burger, Esquire, MARGOLIS EDELSTEIN, 1500 Grant Building, Pittsburgh, PA 15219-2203; (4) Mark E. Kinley, Esquire, STEPTOE & JOHNSON, 4th Floor, Riley Building, 14th & Chapline Streets, P.O. Box 150, Wheeling, WV 26003-0440; (5) Susan K. Dirks, Esquire, BASTIEN & LACY, L.C., P.O. Box 2151, Charleston, WV 25328; (6) John Preston Bailey, Esquire, BAILEY, RILEY, BUCH & HARMAN, L.C., 900 Riley Building, P.O. Box 631, Wheeling, WV 26003; and (7) Markham R. Leventhal, Esquire and Stephan I. Voudris, Esquire, JORDEN BURT LLP, 777 Brickell Avenue, Suite 500, Miami, FL 33131-2803.

Entered this 28 day of September, 2001.

/s/ Ronald E. Wilson, Judge
RONALD E. WILSON, JUDGE
Circuit Court of Ohio County,
West Virginia

AGREED TO:

/s/ Thomas Schultz
Counsel for Plaintiffs, Robert
Stillwell and Helen Stillwell

/s/ Kevin S. Burger
Counsel for Defendants, American
Reliable Ins. Co. and Campbell
Insurance Services, Inc.

/s/ Susan K. Dirks
Counsel for Defendant, Berry, Bipus, Chison & Foose, Inc.

/s/ Stephan I. Voudris
Counsel for Defendant, American Bankers Ins. Co. of Florida

/s/ Mark Kinley
Counsel for Defendant, Cunningham Lindsey U.S., Inc.

FIRST JUDICIAL CIRCUIT
OHIO, BROOKE AND HANCOCK COUNTIES

RONALD E. WILSON, JUDGE
HANCOCK COUNTY COURTHOUSE
NEW CUMBERLAND, WEST VIRGINIA
26047

TELEPHONE
304 / 564-3311 Ext. 231
FAX: 304 / 564-4059

August 30, 2001

* * *

Re: Robert Stillwell, et al. Vs
American Reliable Ins. Co., et al.

LETTER OPINION

I have read Bradford-Scott Data Corporation, Inc., Plaintiff- Appellee, v. Physician Computer Network, Inc., et al., Defendants-Appellants and conclude that the case is not persuasive authority on defendants' request for a stay of Circuit Court proceedings pending appeal.

If the Supreme Court of Appeals of West Virginia decides to hear the defendants' appeal it will also issue a stay of proceedings in my Court. This fact, and the fact that this case has not been set for trial, are the determinative facts in my decision to not stop discovery proceedings pending a decision by the Supreme Court.

It is so ORDERED

/s/ Ronald E. Wilson
Ronald E. Wilson, Judge

APPENDIX C

STATE OF WEST VIRGINIA

At a Regular Term of the Supreme Court of Appeals continued and held at Charleston, Kanawha County, on the 24th of October, 2001, the following order was made and entered:

State of West Virginia ex rel. American Reliable Insurance Company, American Bankers Insurance Company of Florida and Campbell Insurance Services, Inc., Petitioners

vs.) No. 012010

Honorable Ronald E. Wilson, Judge of the Circuit Court of Ohio County, Robert Stillwell and Helen Stillwell, Respondents

On a former day, to-wit, September 27, 2001, came the petitioners, American Bankers Insurance Company of Florida, by Bailey, Riley, Buch & Harman, and John Preston Bailey, its attorneys, and American Reliable Insurance Company and Campbell Insurance Services, Inc., by Kevin S. Burger, their attorney, and presented to the Court their petition, memorandum of law in support thereof, and appendix, praying for a writ of prohibition to be directed against the respondents, the Honorable Ronald E. Wilson, Judge of the Circuit Court of Ohio County, Robert Stillwell and Helen Stillwell, as therein set forth. Thereafter, on the 10th day of October, 2001, came the respondents, Robert Stillwell and Helen Stillwell, by Thomas C. Schultz and Don A. Yannerella, their attorneys, and

presented to the Court their written response with appendix in opposition thereto.

Thereafter, on the 11th day of October, 2001, again came the petitioners, American Bankers Insurance Company of Florida, by Bailey, Riley, Buch & Harman, and John Preston Bailey, its attorneys, and American Reliable Insurance Company and Campbell Insurance Services, Inc., by Kevin S. Burger, their attorney, and presented to the Court their motion in writing seeking a stay of proceedings in the Circuit Court of Ohio County, pending this Court's ruling on the petition for a writ of prohibition. Thereafter, on the 16th day of October, 2001, came the respondents, Robert Stillwell and Helen Stillwell, by Thomas C. Schultz and Don A. Yannerella, their attorneys, and presented to the Court their written response in opposition thereto.

Finally, on the 17th day of October, 2001, again came the petitioners, American Bankers Insurance Company of Florida, by Bailey, Riley, Buch & Harman, and John Preston Bailey, its attorneys, and American Reliable Insurance Company and Campbell Insurance Services, Inc., by Kevin S. Burger, their attorney, and presented to the Court their motion in writing to consolidate the petition for a writ of prohibition filed in this Court on the 27th day of September, 2001, with the petition for appeal filed in the Circuit Court of Ohio County on the 10th day of October, 2001, for the reasons stated therein. Thereafter, on the 22nd day of October, 2001, came the respondents, Robert Stillwell and Helen Stillwell, by Thomas C. Schultz and Don A. Yannerella, their attorneys, and presented to the Court their written response in opposition thereto.

Upon consideration whereof, the Court is of opinion that a rule should not be awarded and the writ prayed for by the petitioners is hereby refused. Justices Starcher and Albright refuse the petition for a writ of prohibition on the basis that consideration of this matter is premature and can be considered on appeal. Justice Davis and Maynard would grant the petition for a writ of prohibition on the basis that federal law would compel arbitration.

Petitioners' motion for a stay of proceedings is hereby refused as moot. Petitioners' motion to consolidate is hereby refused as moot.

A True Copy

Attest: /s/ Roy L. Perry, II.
Clerk, Supreme Court of Appeals

APPENDIX D

STATE OF WEST VIRGINIA

At a Regular Term of the Supreme Court of Appeals continued and held at Charleston, Kanawha County, on the 10th of January, 2002, the following order was made and entered:

Robert Stillwell and Helen Stillwell,
individually and on behalf of all
others similarly situated, Plaintiffs
Below, Respondents

vs.) No. 012231

American Reliable Insurance Company,
et al., Defendants Below

American Reliable Insurance Company,
Campbell Insurance Services, Inc.,
and American Bankers Insurance
Company of Florida, Defendants
Below, Petitioners

On a former day, to-wit, October 24, 2001, came the petitioners, American Bankers Insurance Company of Florida, by Bailey, Riley, Buch & Harman, and John Preston Bailey, its attorneys, and American Reliable Insurance Company and Campbell Insurance Services, Inc., by Kevin S. Burger and Margolis Edelstein, their attorneys, and presented to the Court their petition praying for an appeal from judgments of the Circuit Court of Ohio County, rendered on the 12th day of June, 2001, and on the 1st day of October, 2001.

Upon consideration whereof, the Court is of opinion to and doth hereby refuse said petition for appeal. Justice Maynard would grant.

A True Copy

Attest: /s/ Roy L. Perry, II.
Clerk, Supreme Court of Appeals

APPENDIX E

STATE OF WEST VIRGINIA

At a Regular Term of the Supreme Court of Appeals continued and held at Charleston, Kanawha County, on the 13th of March, 2002, the following order was made and entered:

Robert Stillwell and Helen Stillwell,
individually and on behalf of all
others similarly situated, Plaintiffs
Below, Respondents

vs.) No. 012231

American Reliable Insurance Company,
et al., Defendants Below

American Reliable Insurance Company,
Campbell Insurance Services, Inc.,
and American Bankers Insurance
Company of Florida, Defendants
Below, Petitioners

On a former day, to-wit, February 11, 2002, came the petitioners American Bankers Insurance Company of Florida, by Bailey, Riley, Buch & Harman, and John Preston Bailey, its attorneys, and American Reliable Insurance Company and Campbell Insurance Services, Inc., by Kevin S. Burger and Margolis Edelstein, their attorneys, and presented to the Court their motion in writing requesting this Court's reconsideration of its order entered on the 10th day of January, 2002, or, in the

alternative, for a stay of proceedings in the Circuit Court of Ohio County, for the reasons stated therein.

This matter initially came before the Court on petitioners' petition for appeal of the circuit court ruling on petitioners' motion to compel arbitration of this matter and stay further proceedings in the circuit court pursuant to the Federal Arbitration Act. 9 U.S.C. Section 1, *et seq*. The circuit court preliminarily denied the motion to compel arbitration based upon findings of fact and analysis of state law. The petition for appeal was denied by the aforementioned order entered on the 10th day of January, 2002. In the current motion, petitioners again seek to appeal the merits of the order denying arbitration and to stay all proceedings in the circuit court pending resolution of the appeal.

Upon consideration whereof, the Court is of the opinion that an appeal of the merits of this matter continues to be premature. Specifically, it appears that issues of fact and of state law have not been finally determined below, which issues may determine the questions of when and to what extent the Federal Arbitration Act applies to the contracts involved in this case. Accordingly, it is hereby ordered that the motion for reconsideration of this Court's order entered on the 10th day of January, 2002, refusing the petition for appeal in the above-captioned proceeding be, and it hereby is, refused. Chief Justice Davis and Justice Maynard would grant.

It is further ordered that the motion for a stay of proceedings in the Circuit Court of Ohio County be, and it hereby is, granted in order to permit the filing of a petition for a writ of certiorari with the Supreme Court of the United States. It is finally ordered that proceedings in the Circuit Court of

Ohio County in the above-captioned proceeding, be, and they hereby are, stayed for a period of ninety days from the date of this order. Justice Maynard would refuse the motion for a stay of proceedings.

A True Copy

Attest: /s/ Roy L. Perry, II.
Clerk, Supreme Court of Appeals

APPENDIX F

AMERICAN RELIABLE INSURANCE COMPANY
A Subsidiary of American Bankers Insurance Group
HOME OFFICE:
8655 E. Via De Ventura
Scottsdale, Arizona 85258
(602) 483-8666
(800) 535-1333

SPECIAL MOBILE HOMEOWNERS POLICY

* * *

GENERAL POLICY CONDITIONS

These general conditions apply to your policy. This policy is issued in reliance upon the truth of your representations, and this policy includes all agreements existing between you and us or any of your agents.

* * *

ARBITRATION CLAUSE

Any and all disputes, controversies or claims of any kind and nature between you and us arising out of or in any way related to the validity, interpretation, performance or breach of any provisions of this policy, and upon which a settlement has not been reached by you and us, shall be resolved exclusively, by

arbitration in accordance with the Federal Arbitration Act (9 U.S.C. § 1 ET SEQ).

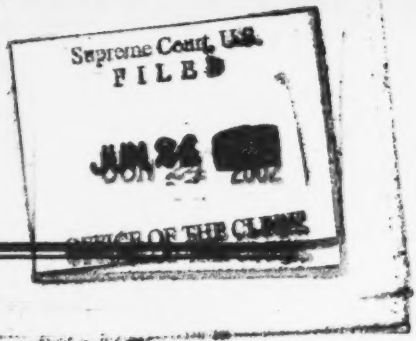
You shall appoint one arbitrator and we shall appoint an arbitrator. The two arbitrators appointed shall together pick a third arbitrator. Any decision of the arbitrators shall be by majority vote. In all other respects, the rules and procedures of the American Arbitration Association's Commercial Arbitration Rules shall govern the arbitration proceeding, except to the extent that such rules and procedures conflict with the Federal Arbitration Act. Arbitration shall be held in the city and state where the insured(s) resides, unless otherwise agreed, in writing, by the parties. In no event shall the arbitrators grant any relief not available in the courts of the state where the policy is issued. Judgment upon the arbitration award shall be entered in a court of general jurisdiction in the state where you reside. Appeals may be taken from the arbitrators' decision only in accordance with the Federal Arbitration Act.

You and we understand that:

1. discovery in an arbitration proceeding may be more limited than and different from that in a court proceeding;

2. the arbitrators are not required to state the basis of their decision or to issue any findings of fact; and

3. both your and our right to appeal or to seek modification of rulings by the arbitrators may be limited.



No. 01-1842

IN THE

Supreme Court of the United States

AMERICAN RELIABLE INSURANCE COMPANY, AMERICAN BANKERS INSURANCE COMPANY OF FLORIDA, and CAMPBELL INSURANCE SERVICES, INC.,

Petitioners,

v.

ROBERT STILLWELL and HELEN STILLWELL

Respondents.

On Petition for Writ Of Certiorari to the Supreme Court of Appeals of West Virginia

BRIEF IN OPPOSITION

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SUMMARY OF THE ARGUMENT

I. Petitioners have failed to disclose to this Court a diversity suit in which they presently seek federal relief from the state court's arbitration order. The federal suit is captioned *American Reliable Insurance Company, American Bankers Insurance Company of Florida and Campbell Insurance Services, Inc., v. Robert Stillwell and Helen Stillwell*, Northern District of West Virginia Civil Action No. 5:01CV59. Among other things, the district court denied Petitioners' motion to compel arbitration and has ruled that the insurer waived arbitration in the matter now before this Court. See Appendix A, page 10a.

II. Petitioners have misrepresented the substance of the state rulings of which they complain. Petitioners were never denied an appeal. Moreover Petitioners have misrepresented on page 1 of their Petition, that the West Virginia Supreme Court of Appeals has "held that West Virginia is not required to provide an immediate interlocutory appeal of an order denying a motion to compel arbitration and stay judicial proceedings under the FAA." The state supreme court held no such thing. See orders of the West Virginia Supreme Court of Appeals, Petitioners' Appendix C, D and E.

III. Respondents' claims are not subject to arbitration. The arbitration provision was obviously not intended to govern class claims. It is completely silent as to class claims and therefore cannot be as broad as Petitioners contend. See *Champ v. Siegel Trading Co., Inc.*, 55 F.3d 269 (7th Cir. 1995).

IV. West Virginia's "bargained for" doctrine, the main target of Petitioners' anathema with respect to West Virginia's body of arbitration law, does not conflict with federal law and is consistent with the federal requirement that an arbitration agreement must be bargained for to pass muster under the Seventh Amendment to the United States Constitution.

ARGUMENT

I. THE PETITION NEGLECTS TO INFORM THIS COURT THAT PETITIONERS ARE ALSO PROSECUTING A FEDERAL DIVERSITY ACTION AGAINST RESPONDENTS TO APPEAL THE STATE COURT'S ARBITRATION ORDER AND THAT THE FEDERAL DISTRICT COURT HAS DETERMINED THAT THE INSURER WAIVED ARBITRATION

Petitioners should have told this Court that their request for arbitration was denied not only by the state court but also by a federal district court in *American Reliable Insurance Company, American Bankers Insurance Company of Florida and Campbell Insurance Services, Inc., v. Robert Stillwell and Helen Stillwell*, Northern District of West Virginia Civil Action No. 5:01CV59.

Rule 14(i)(ii) of the Rules of the Supreme Court of the United States provides, in part, that the Petition shall contain "...any other relevant opinions, orders, findings of fact, and conclusions of law entered in the case by courts or administrative agencies..."

On June 11, 2001, the Circuit Court of Ohio County, West Virginia, entered the arbitration order of which Petitioners complain. On the heels of the state court's order denying arbitration, Petitioners served a federal summons attacking the state court's ruling. The district court, on March 18, 2002, found Petitioners' federal suit to be the "functional equivalent of an appeal from the June 11, 2001, state court decision" and ordered Petitioners' suit dismissed. See Appendix A, pages 9a -10a. Petitioners are now appealing the district court's decision. The district court also determined that

the insurer waived arbitration. Appendix A, page 10a. Petitioners' deliberate omission would seem to transgress the spirit if not the letter of the Rules of the Supreme Court of the United States.

II. PETITIONERS HAVE MISREPRESENTED THE SUBSTANCE OF THE STATE SUPREME COURT'S ORDERS FROM WHICH THEY SEEK RELIEF

Petitioners seek relief in this Court from an order of the West Virginia Supreme Court of Appeals entered on March 13, 2002. See Petitioners' Appendix E. Petitioners characterize the state supreme court's order as the denial of a right of appeal but the order says otherwise. After reciting the history of proceedings, the West Virginia Supreme Court states as follows:

> "Upon consideration whereof, the Court is of the opinion that an appeal of the merits of this matter continues to be premature. Specifically, it appears that issues of fact and of state law have not been finally determined below, which issues may determine the questions of when and to what extent the Federal Arbitration Act applies to the contracts involved in this case."

Petition, Appendix E, page 14a. (Emphasis added.)

Far from denying an appeal and ignoring federal law, the state supreme court's order *invites* an appeal and expresses West Virginia's intention to consider federal law if and when the record below is sufficiently mature to allow a reasoned determination. Petitioners seem to forget that state law

determines the validity, revocability and enforceability of the arbitration agreement, as the federal district judge properly noted in disposing of Petitioners' federal appeal. See Appendix A, page 16a. [1]

Petitioners have also misrepresented to this Court that the West Virginia Supreme Court of Appeals "held" in this case that "West Virginia is not required to provide an immediate interlocutory appeal of an order denying a motion to compel arbitration and stay judicial proceedings under the FAA." See Petition, page 1. West Virginia "held" no such thing in this matter. See Petitioners' Appendix C, D and E.

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[1] Coincidentally, on June 13, 2002, the West Virginia Supreme Court of Appeals filed a decision in another case involving American Bankers Insurance Company of Florida, *State of West Virginia, ex rel. James Dunlap v. Berger, et al.*, No. 30035. The full text of this case may be viewed at http://www.state.wv.us/wvsca/docs/spring02/30035.htm. In *Dunlap*, which is relevant in that it also involves an arbitration clause contained in a contract of adhesion, the state supreme court refused to enforce an arbitration agreement, concluding, *inter alia*, that the arbitration provision would unconscionably deny the right to pursue class claims. The state supreme court carefully balanced concerns of state and federal law and voiced a profound respect for arbitration, stating, that the party drafting the agreement, "...sought to unilaterally use (one could say "misuse") the honorable mechanism of arbitration -- that has found a respected place in the commercial life of our nation -- as a scheme or mechanism to shield itself from legal accountability for misconduct." *Dunlap*, page 17 of 25. In the present case also, Petitioners are simply trying to shield themselves from accountability -- particularly class action accountability. Interestingly, American Bankers, represented in *Dunlap* by the same law firm as in the present case (Jordan-Burt) filed a collateral federal suit to hedge its bets, as was also done in the present case. The Fourth Circuit Court of Appeals chastised the federal plaintiffs in *Dunlap*, including American Bankers, for the very same jurisdictional improprieties Petitioners exercised in their improper, collateral federal appeal in the present case. *See Friedman's Inc. v. Dunlap*, 01-1407 (4th Cir. 2002).

Further belying Petitioners' claims that West Virginia fails to grant appellate review, on June 17, 2002, Petitioners filed an "Emergency Motion to Extend Stay of Circuit Court Proceedings Pending Resolution of Petition for Writ of Certiorari to the United States Supreme Court." In their motion, expressly contradicting their representation to this Court, Petitioners acknowledge that the West Virginia Supreme Court of Appeals grants appellate review appropriately in arbitration cases. Petitioners say in their state supreme court motion:

> "Indeed, like the U.S. Supreme Court, this Court has noted in the context of appellate review of arbitration orders that 'to compel [Petitioners] to proceed through the trial process and then appeal to this Court would be inefficient, and a **waste of the time and resources** of the circuit court and of this Court.'" (Emphasis in Petitioners' motion).

Appendix B, page 21a, excerpt from Petitioners' June 17, 2002, motion to the state supreme court in *American Reliable Ins. Co., et al., v. Stillwell*, No, 012231.

III. THE PARTIES' DISPUTE IS NOT SUBJECT TO ARBITRATION BECAUSE, AMONG OTHER THINGS, THE ARBITRATION PROVISION IS SILENT AS TO CLASS CLAIMS

The arbitration clause found in the insurance policy was obviously not for the purpose of arbitrating class claims. The arbitration provision does not even speak to class claims. Petitioners insist, though, that the arbitration clause is so broad as to encompass every conceivable claim -- even Respondents' class claims. Absent a provision for class treatment of

disputes, however, a court has no authority to certify class arbitration. *Champ v. Siegel Trading Co., Inc.*, 55 F.3d 269 (7th Cir. 1995). Accordingly, the arbitration clause cannot be as broad as Petitioners say it is. If the arbitration clause were as broad as Petitioners contend, it is invalidated on those grounds for effectively removing the policyholders' ability to pursue a remedy on behalf of a class of policyholders similarly situated.

An arbitration provision that would allow an insurer to thwart a class action benefits only the insurer, making the provision so totally one-sided in that respect as to render it unenforceable.

A Florida appellate court reached the same conclusion in *Powertel v. Bexley,* 743 So. 2d 570 (Fla. App. 1 Dist. 1999), rehearing denied, May, 2000. In *Powertel*, the Florida court examined an arbitration agreement in a consumer contract for telephone service. As in the present case, the arbitration clause invoked the Federal Arbitration Act, 9 U.S.C § 1, *et seq.* ("FAA"). Citing *Champ,* the state court reasoned that the arbitration provision was unenforceable because appellees, consumers pursuing a class action for statutory violations, if compelled to arbitrate, would be deprived of the ability to pursue a class action. While acknowledging the strong federal policy in favor of arbitration, the Florida court concluded that if arbitration were to deprive a party of remedies otherwise available in a court of law, the arbitration clause was rendered invalid. The same is true in the present case.[2]

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[2] Unlike *Powertel*, the arbitration clause in the case at bar is in an insurance policy. This is noteworthy because the McCarran-Ferguson Act, 15 U.S.C. § 1011 *et seq.*, reserves regulation of the business of insurance to the states, calling into question Petitioners' preemption argument. The FAA is not an Act specifically related to the business of insurance, *Davister Corp. v. United Republic Life Insurance Co.*, 152 F. 3d 1277, fn 1 (10th Cir. 1998),

IV. WEST VIRGINIA LAW IS CONSISTENT WITH FEDERAL LAW IN RESPECT TO ARBITRATION

Petitioners say West Virginia's "bargained for" doctrine conflicts with federal law, but federal law mandates the same result as West Virginia's "bargained for" doctrine. Under federal law, an application to compel arbitration must be denied, leaving the opposing party with unrestricted access to a jury trial unless the party seeking arbitration can establish the right to arbitration, including the making of the agreement. *See C.P. Robinson Const. Co., v. National Corp for Hous. Part.*, 375 F. Supp. at 446, 451.

The seventh amendment right to a jury trial is fundamental. It may be waived by contract, but an effective waiver must be knowing and intentional. *See K.M.C. Co. v. Irving Trust Co.*, 757 F.2d 752, 755-56 (6th Cir. 1985); *National Equipment Rental Ltd. v. Hendrix*, 565 F.2d 255, 258 (2d Cir. 1977). *See also, Leasing Serv. Corp.*, 804 F.2d at 833 (4th Cir. 1986) (waiver upheld because parties were not manifestly unequal in bargaining power and both had sophistication in business, participated in extensive negotiations and the party seeking to avoid the waiver had carefully reviewed the entire contract). *See also, Connecticut Nat'l Bank*, 826 F. Supp. at 60-62 (court considered sophistication of parties, representation by counsel and equality of bargaining power).

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and does not gain automatic federal priority as Petitioners claim.

CONCLUSION

Given the lack of merit to any of Petitioners' claims, the Petition for Writ of Certiorari should be denied.

Aside from the absence of any genuine issue that would justify the United States Supreme Court's intervention in this matter, Petitioners' concealment of their federal appeal in the Northern District of West Virginia is adequate cause to refuse. This Court should also not tolerate misrepresentations by Petitioners as to the holdings of the state supreme court.

Respectfully submitted,

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June 24, 2002

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF WEST VIRGINIA

AMERICAN RELIABLE INSURANCE COMPANY, AMERICAN BANKERS INSURANCE COMPANY OF FLORIDA, and CAMPBELL INSURANCE SERVICES, INC.,	)	
Plaintiffs/Petitioners,	)	
vs.	)	Case No. 5:01CV59 (STAMP)
ROBERT STILLWELL and HELEN STILLWELL,	)	
Defendants/Respondents.	)	

MEMORANDUM OPINION AND ORDER GRANTING DEFENDANTS' MOTION TO DISMISS, DENYING PLAINTIFFS' MOTION TO COMPEL ARBITRATION, DENYING DEFENDANTS' MOTION FOR ATTORNEYS' FEES AND EXPENSES OF LITIGATION, DENYING PLAINTIFFS' MOTION FOR RULE 11 SANCTIONS, DENYING DEFENDANTS' MOTION TO STRIKE AND GRANTING PLAINTIFFS' MOTION FOR LEAVE TO FILE SURREPLY

I. Introduction

Pending before this Court is the motion to dismiss of defendants/respondents, Robert and Helen Stillwell. Also, pending before this Court is the joint motion to compel arbitration of plaintiffs/petitioners, American Reliable Insurance Company ("American Reliable"), American Bankers Insurance Company of Florida ("American Bankers"), and Campbell Insurance Services, Inc. ("Campbell") (collectively "plaintiffs"), as well as several other motions.[1] This Court has now reviewed the motions and memoranda in support thereof and in opposition thereto. For the reasons set in this opinion, this Court finds that defendants' motion to dismiss should be granted, plaintiffs' motion to compel arbitration of defendants' claims should be denied, defendants' motion to strike should be denied, defendants' motion for attorneys' fees and expenses of litigation should be denied, Campbell's motion for leave to file surreply should be granted, and American Reliable's motion for Rule 11 sanctions should be denied.

II. Facts

The defendants purchased an American Reliable mobile home owners policy on or about February 9, 1999, which contained an arbitration clause.[2] On April 9, 1999, the

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[1]The other motions pending before this Court include a motion by defendants Stillwell to strike plaintiffs' reply memorandum in support of motion to compel arbitration, motion by defendants for attorneys' fees and expenses of litigation, motion by plaintiff Campbell for leave to file instanter, a surreply memorandum of law in opposition to defendants' motion to dismiss, and a motion by plaintiff American Reliable for Rule 11 sanctions.

[2]The arbitration clause stated:

defendants sustained a casualty loss to their property. Defendants claim that the loss was covered by the American Reliable insurance policy, but American Reliable claims that the loss was not covered by the policy. Nevertheless, American Reliable settled the plaintiffs' property damage claim for $9,200.00. The defendants then filed a lawsuit in the Circuit Court of Ohio County, West Virginia on February 29, 2000 claiming that American Reliable and certain purported agents breached the insurance policy agreement, engaged in a series of unfair claims settlement practices, acted in bad faith in settling the defendants' claim, used an unlicensed insurance adjuster, and violated West Virginia insurance law. American Reliable and Campbell filed an answer offering 14 affirmative defenses, none of which referred to their desire to arbitrate the claims in accordance with the arbitration clause. The defendants Stillwell subsequently filed a motion for leave to amend their complaint, which was granted on April 2, 2001. The amended complaint added class action allegations and added American Bankers as a defendant. American Reliable and Campbell filed an answer to the amended complaint, which contained 23 affirmative defenses. The 21st affirmative defense did mention the existence of the arbitration clause.

> **Any and all disputes, controversies or claims of any kind and nature between you and us arising out of or in any way related to the validity, interpretation, performance or breach of any provisions in this policy, and upon which a settlement has not been reached by you and us, shall be resolved exclusively, by arbitration in accordance with the Federal Arbitration Act.** (9 U.S.C. § 1, ET SEQ.)

American Reliable Ins. Co. Spec. Mobile Homeowners Policy at 9.

The plaintiffs participated in the state court proceedings for 14 months prior to filing their joint motion to compel arbitration and to stay judicial proceedings on May 1, 2001.[3] The plaintiffs, along with a co-defendant not named in the action before this Court, filed a joint motion to compel arbitration and to stay judicial proceedings in the state court pursuant to the Federal Arbitration Act ("FAA"), 9 U.S.C. § 1, et seq.[4] On May 18, 2001, the plaintiffs filed a complaint and petition to compel arbitration in this Court.[5] On June 11, 2001, the state court entered an order denying plaintiffs' motion to compel arbitration and stay judicial proceedings based upon the fact that the state court found the insurance contract to be a contract of adhesion and that there was no evidence that the parties to the contract knowingly bargained for an arbitration clause. On June 13, 2001, after the state court entered its order denying the motion to compel arbitration, a summons was issued and returned executed to this Court as to the defendants.

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[3] American Reliable as well as a co-defendant not named in the action before this Court filed a crossclaim against another co-defendant not named in the action before this Court in May 2000. The plaintiffs have also answered discovery, entered into agreements concerning discovery, attended hearings, and have been ordered to produce documents that were withheld from discovery. The state court also entered an order preserving evidence in possession of Campbell and an agreed scheduling order endorsed by American Reliable and Campbell.

[4] Section 3 of the FAA provides for a stay of the proceedings when issues in the proceedings are referable to arbitration and Section 4 allows a party to petition for an order compelling arbitration when one party has failed, neglected, or refused to comply with an arbitration agreement in that civil action.

[5] It should be noted that the plaintiffs could not remove the state court case to this Court because one of the named defendants in the state court action was a resident of West Virginia and therefore complete diversity was not present.

On June 22, 2001, the plaintiffs filed a joint motion to compel arbitration and memorandum in support in this Court. In their memorandum in support of their motion to compel arbitration, the plaintiffs state:

> On June 11, 2001, the state court issued an erroneous ruling which failed to follow Federal law under the FAA and which denied the motion to compel arbitration on the ground that the arbitration clause had not been separately "bargained for." . . . The state court's decision denying arbitration is directly contrary to binding United States Supreme court authority under the FAA, which firmly holds that a court may not discriminate against an arbitration clause by enforcing all other provisions of a contract but not its arbitration clause. Allied-Bruce Terminex Cos. v. Dobson, 513 U.S. 265, 277 (1995). Accordingly, the Petitioners hereby move this Court to enforce Federal law under the FAA and to enter an Order compelling the parties' dispute to arbitration.

Mem. in Supp. of Mot. to Compel Arbitration at 4. On June 29, 2001, the defendants filed a motion to dismiss and memorandum in support based upon (1) the Rooker-Feldman doctrine; (2) the Younger abstention doctrine; (3) the "wise judicial administration" doctrine; (4) res judicata and/or collateral estoppel; (5) lack of jurisdiction over the subject matter of this action; (6) that the relief sought by the plaintiffs cannot be granted because arbitration cannot be compelled against the policyholders; and (7) the Full Faith and Credit Act, 28 U.S.C. § 1738.

III. Discussion

A. Subject Matter Jurisdiction

The defendants made several arguments in their motion to dismiss, two of which focus on their contention that this Court lacks subject matter jurisdiction over this action. "The FAA does not create independent federal question jurisdiction under 28 U.S.C. § 1331. A federal district court has jurisdiction over a petition filed under the FAA only when the plaintiffs establish an independent basis of jurisdiction, such as diversity of citizenship." Cigna Healthcare of St. Louis, Inc. v. Kaiser, 181 F.Supp.2d 914, 919 (N.D. Ill. 2002) (citing Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 25 n.32 (1983)).

Although defendants argue that this Court does not have jurisdiction over this matter pursuant to 28 U.S.C. § 1332, this Court finds that complete diversity does exist and the amount in controversy exceeds $75,000.00.

Defendants also contend that this Court lacks subject matter jurisdiction under the Rooker-Feldman doctrine. The Rooker-Feldman doctrine provides that "'a United States District Court has no authority to review final judgments of a state court in judicial proceedings.'" Brown & Root, Inc. v. Breckenridge, 211 F.3d. 194, 198 (4th Cir. 2000) (quoting District of Columbia Court of Appeals v. Feldman, 460 U.S. 462, 482 (1983)). The Rooker-Feldman doctrine also bars consideration of any claim that is "inextricably intertwined" with the state court decision. See id. This means that a federal district court cannot consider a claim that, although not actually decided by the state court, requires the federal court to determine that the state court wrongly decided the issues before it. See id. (citing Plyler v. Moore, 129 F.3d 728, 731 (4th Cir.

1997)). The Rooker-Feldman doctrine also applies to interlocutory orders issued by state courts. See id. at 199. The basic principle of the doctrine is that "'[a] party losing in state court is barred from seeking what in substance would be appellate review of the state judgment in a Unites States district court, based on the losing party's claim that the state judgment itself violates the loser's federal rights.'" Id. at 198 (quoting Johnson v. De Grandy, 512 U.S. 997, 1005-06 (1994)). The defendants argue that the plaintiffs' federal complaint is an impermissible collateral attack on a state court decision. The plaintiffs argue in response that this case is a separate parallel petition under the FAA, which has been expressly approved by federal courts and is not the type of federal appeal of a state court action to which the Rooker-Feldman doctrine applies. Plaintiffs contend that because they filed their federal court petition before the state court ruled on the merits of their motion to compel arbitration, the federal petition cannot be characterized as an appeal, and therefore, the Rooker-Feldman doctrine does not apply.

The plaintiffs rely on the case of Doctor's Assocs., Inc. v. Distajo, 107 F.3d 126 (2d Circ. 1997), to stand for the proposition that the Rooker-Feldman doctrine is inapplicable in a case where the federal court petition to compel arbitration was filed prior to the state court denying a motion to compel arbitration. However, the facts in Distajo differ greatly from the facts of the case at hand.

In Distajo, several franchisees brought suit in the state courts in Illinois, Pennsylvania, Massachusetts and North Carolina against Doctor's Associates, Inc. ("DAI") alleging fraud, various breaches of the franchise agreement, and seeking a declaration that the arbitration clause in the franchise agreement was unenforceable. See id. at 128. DAI did not file a motion to compel arbitration in state court, but instead filed

a motion to compel in federal court as well as a written demand for arbitration with the American Arbitration Association. See id. In one of the cases, the franchisees moved for and obtained default judgment against DAI because DAI did not appear in the state court action. See id. at 137. After default judgment was obtained, the federal court granted DAI's petition to compel arbitration of those franchisees' claims and entered a preliminary injunction enjoining the franchisees from further prosecuting their state court suit. See id. The Second Circuit reversed the district court's order and vacated the preliminary injunction/temporary restraining order ("TRO"). See id. The district court then entered a TRO enjoining the franchisees from prosecuting their state suit. See id. However, the franchisees did not advise the state court of the TRO. See id. The state court, upon being advised of the Second Circuit's decision lifting the injunction, awarded the franchisees $400,000.00 in damages. See id. The franchisees then argued that the state court judgment stripped the district court of subject matter jurisdiction to entertain DAI's petition to compel arbitration. See id. On appeal, the Second Circuit held that "DAI filed its petitions to compel arbitration of the franchisees' state actions before the state courts had made any rulings on the merits in those actions." Id. at 138 (citations omitted). On these facts, the Second Circuit found that the district court did not lack jurisdiction under Rooker-Feldman to adjudicate DAI's petitions to compel arbitration. See id.

Another case relied on by the plaintiffs is Central Reserve Life Ins. Co. v. Marello, No. Civ. A. 00-3344, 2001 WL 41129 (E.D. Pa. Jan. 17, 2001). In Marello, Marello filed a complaint in state court against her health insurance company, Central Reserve Life Insurance Company, on June 6, 2000. See id. at *1. Central Reserve promptly filed its federal complaint and motion to compel arbitration on June 30, 2000. See id. It also filed preliminary objections to Marello's state

court complaint on July 5, 2000, raising, in part, the arbitrability of Marello's claim under the FAA. See id. The state court overruled Central Reserve's preliminary objections on September 20, 2000 and the federal court subsequently granted Central Reserve's motion to compel on October 4, 2000. See id. The court found that "[a]t the time it was filed, Central Reserve's Motion to Compel Arbitration was neither a direct appeal from an adverse state ruling, nor the functional equivalent thereof." Id. at *4. Accordingly, the court found that the Rooker-Feldman doctrine was not implicated because there was no ruling on the merits from which to appeal. See id.

These cases can be distinguished from the case currently pending before this Court. In this case, although the plaintiffs may have filed a complaint and petition to compel arbitration in this Court before the state court entered its order denying their state court motion to compel arbitration, they did not file a memorandum in support of their motion to compel with this Court until after the state court ruling. Also, the plaintiffs' memorandum in support of their motion to compel arbitration contends that the state court issued an erroneous ruling, which failed to follow federal law under the FAA. Further, a summons on the comp'aint was not returned executed as to the defendants until June 13, 2001, which was after the state court ruling.

This Court finds that this particular factual situation renders the plaintiffs' motion to compel arbitration a "functional equivalent" of an appeal from the June 11, 2001 state court decision. This is not a case where the plaintiffs, from the beginning, asked this Court to compel arbitration, but rather one in which the plaintiffs attempted to shop between two forums in order to gain a strategic advantage. Although this Court recognized that it is proper for a party to file a motion in federal court seeking an order compelling arbitration

under the FAA while the underlying state court proceeding remains pending, it is not proper for a party to file two of the same motions in both state court and federal court and to then wait until after the state court renders an unfavorable ruling before the party pursues its motion in federal court. Plaintiffs were clearly looking for the proverbial "two bites of the apple" by filing a motion to compel arbitration in both the state and federal court. Not only do the plaintiffs practically contend in their memorandum in support of their motion to compel that they are appealing the state court order, but their failure to actively pursue their complaint and petition to compel arbitration until after the state court ruling clearly demonstrates that this is a functional equivalent of an appeal of a state court order. Accordingly, this Court finds that the Rooker-Feldman doctrine applies and that this Court lacks subject matter jurisdiction to decide this case.

B. Waiver

However, even if this Court were to find that it did have subject matter jurisdiction, this Court finds that the plaintiffs have waived their right to insist on arbitration. "Under the Federal Arbitration Act, a party may demand a stay of federal judicial proceedings pending exercise of a contractual right to have the subject matter of the federal action decided by arbitration, unless the party seeking arbitration is 'in default' of that right." MicroStrategy Inc. v. Lauricia, 268 F. 3d 244, 249 (4th Cir. 2001) (quoting Maxum Founds., Inc. v. Salus Corp., 779 F.2d. 974, 981 (4th Cir. 1985)); see also 9 U.S.C. § 3. Although "default is akin to waiver," any doubts as to whether the party has waived its right to compel arbitration, must be resolved in favor of arbitration. Id. The Fourth Circuit has held:

> A party may waive its right to insist on arbitration if the party "so substantially utiliz[es] the litigation machinery that to subsequently permit arbitration would prejudice the party opposing the stay." . . . But even in cases where the party seeking arbitration has invoked the "litigation machinery" to some degree "[t]he dispositive question is whether the party objecting to arbitration has suffered actual prejudice.

Id. at 249 (citations omitted). "The party opposing arbitration 'bears the heavy burden of proving waiver.'" Id. at 250 (quoting American Recovery Corp. v. Computerized Thermal Imaging, Inc., 96 F.3d 88, 95 (4th Cir. 1996)).

A court may consider the delay in seeking arbitration when determining whether a waiver occurred. See id. at 250. There is no doubt that the plaintiffs delayed in seeking arbitration for over a year after the complaint was filed. The contention that the claim may be arbitrable was never raised until the plaintiffs filed their answer and affirmative defenses to the amended complaint and their motion to compel arbitration in state court approximately 14 months after the proceedings began and then filed their motion to compel in this Court 18 days after they filed their state court motion to compel.

However, this Court is aware that "mere delay, without more, will not suffice to constitute a waiver." Maxum Founds., Inc., 779 F.2d at 982. This Court must also look at whether the plaintiffs waived their right to insist on arbitration by virtue of their litigation activities in the state court. See MicroStrategy, Inc., 268 F.3d at 250. This requires the Court to look at whether the plaintiffs' litigation in state court centered around

the defendants' arbitrable claims. See id. at 251. This Court finds that the litigation in the state court did, in fact, center around the claims that the plaintiffs now contend are arbitrable. Accordingly, the plaintiffs' litigation activities in the state court can be used in support of the argument that the plaintiffs have waived their right to insist on arbitration.

In determining whether a party waived its right to seek arbitration, this Court must also examine whether the party objecting to arbitration has suffered actual prejudice. "[P]rejudice . . .refers to the inherent unfairness – in terms of delay, expense, or damage to a party's legal position – that occurs when the party's opponent forces it to litigate an issue and later seeks to arbitrate that same issue." Distajo, 107 F.3d at 134. This Court finds that the defendants have suffered actual prejudice for several reasons. First, even though they were aware of their right to arbitrate, the plaintiffs proceeded to litigate the state court case for a period of 14 months before they even mentioned that they wished to enforce the arbitration provision in the contract. Second, not only did the plaintiffs delay in seeking to compel arbitration, but their litigation in state court centered around the defendants' arbitrable claims. Third, significant discovery has already taken place in the state court. Fourth, the state court denied plaintiffs' motion to compel arbitration before plaintiffs actively pursued their motion to compel arbitration in this Court. The plaintiffs submitted their motion to compel to one forum and then when they were disappointed with the result in that forum, actively pursued a motion to compel in the other forum. The plaintiffs' willing participation in the litigation in the state court forum was inconsistent with a desire to arbitrate. Accordingly, this Court finds that the defendants have suffered the type of prejudice that supports a finding of waiver. Although the defendants bear a heavy burden of proving waiver and each factor, considered separately, does not support waiver, taken

together, these factors demonstrate that the plaintiffs have waived their right to insist on arbitration.

Even if this Court were to conclude that it had subject matter jurisdiction, and even if this Court were to find that the plaintiffs did not waive their right to insist on arbitration, this Court finds that it should abstain from deciding the plaintiffs' motion to compel arbitration. However, before moving on to the abstention analysis, this Court notes that it agrees with the plaintiffs' argument that any finding or waiver should not apply to American Bankers because American Bankers was not added to the case until the plaintiffs amended their complaint on April 2, 2001. American Bankers delayed only a month in asserting arbitration rights. However, because this Court finds that it does not have subject matter jurisdiction over this matter and because this Court finds that it must abstain from ruling on the motion to compel, the fact that American Bankers did not waive its arbitration rights has no effect on this Court's ultimate decision to dismiss the case.

C. Abstention

In their motion to dismiss, defendants argue that this Court should dismiss this action based on Younger v. Harris, 401 U.S. 37 (1971), and the "wise judicial administration" doctrine enunciated in Colorado River Water Conservation Dist. v. United States, 424 U.S. 800 (1976).

In Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1 (1983), the Supreme Court addressed the question of whether a federal district court may abstain from hearing a motion to compel arbitration out of deference to the parallel litigation brought in state court. See id. at 935. The Court found that Colorado River provided persuasive guidance in deciding the question before it. See id. The Court in

Colorado River held that in certain "exceptional" circumstances, a federal court may abstain from exercising its subject matter jurisdiction due to the existence of a concurrent state court proceeding, based upon "considerations of '[w]ise judicial administration, giving regard to conservation of judicial resources and comprehensive disposition of litigation.'" Colorado River, 424 U.S. at 817 (citations omitted).

The Moses Court identified the four factors in Colorado River as well as two additional factors that a district court must consider when deciding whether to abstain from exercising its jurisdiction due to the concurrent jurisdiction of a state court. These factors are: (1) whether either court has assumed jurisdiction over any res or property; (2) whether the federal forum is any less convenient to the parties than the state forum; (3) the avoidance of piecemeal litigation; (4) the order in which jurisdiction was obtained by the concurrent forums; (5) whether federal or state law provides the rule of decision on the merits; and (6) the adequacy of the state court proceedings to protect the federal plaintiff's rights. The Court stated that "the decision whether to dismiss a federal action because of parallel state-court litigation does not rest on a mechanical checklist, but on a careful balancing of the important factors as they apply in a given case, with the balance heavily weighted in favor of the exercise of jurisdiction. Moses H. Cone, 460 U.S. at 16.

The first and second factors do not weigh in favor of abstention because the state court did not assume jurisdiction over any res or property and the federal forum is located in the same county and city as the state forum.

The third factor, the avoidance of piecemeal litigation, generally is not an issue in situations where there is a state court proceeding and a parallel federal court proceeding seeking to compel arbitration. See Moses H. Cone, 460 U.S. at

21 (stating that the federal arbitrability issue is easily severable from the merits of the underlying state court action). Also Colorado River stated that "the mere potential for conflict in the results of adjudications, does not, without more, warrant staying exercise of federal jurisdiction." Colorado River, 424 U.S. at 816. However, in this case, the fact that there is a "potential" for conflict, is not the only reason this Court chooses to abstain from exercising jurisdiction. "In analyzing whether a dismissal or stay will further the interest in avoiding piecemeal litigation, we look not for formal symmetry between the two actions, but for a substantial likelihood that the state litigation will dispose of all claims presented in the federal case." Lumen Const., Inc. v. Brant Const. Co., Inc., 780 F.2d 691, 695 (7th Cir. 1986) (citation omitted). In this case, the state litigation has disposed of all claims presented in this Court. Not only has the state court already decided the issue before this Court, bur the plaintiffs willingly submitted the issue to the state court for a decision. Because the state court already adjudicated the issues involved in this case, there is much to be gained in judicial economy by abstaining from exercising jurisdiction.

With regard to the fourth factor, the state court obtained jurisdiction of the action more than 14 months before the plaintiffs filed their petition and motion to compel arbitration with this Court. This Court must not only look at which complaint was filed first, but how much progress has been made in the two actions. See Moses H. Come, 460 U.S. at 22. This Court has already discussed the fact that there has been substantial proceedings in the state court. Further, the fact that the state court has already decided the motion to compel arbitration demonstrates that the state court proceedings have progressed well ahead of the proceedings in this Court. Accordingly, the fourth factor weighs in favor of abstention.

This Court finds that the fifth factor enunciated in Moses, whether state or federal law provides the rule of decision, weighs in favor of abstention. Although "[f]ederal law governs the construction of contract language concerning arbitrability," see Smith Barney, Inc. v. Critical Health Sys. of N.C., Inc., 212 F.3d 858, 860 (4th Cir. 2000), state law governs a court's determination of whether a valid agreement to arbitrate arose between the parties. See First Options of Chicago, Inc. v. Kaplan, 514 U.S. 938, 944 (1995); Johnson v. Circuit City Stores, 148 F3d 373, 377 (4th Cir. 1998) (citations omitted) ("Whether a party agreed to arbitrate a particular dispute is an issue for judicial determination to be decided as a matter of contract. . . . In so deciding, the court should apply 'ordinary state-law principles that govern the formation of contracts."). Thus, federal common law is relevant only to provide the basic principle that federal policy favors arbitration and ambiguities are to be interpreted in favor of arbitration. West Virginia law determines the question of the validity, revocability, or the enforceability of the agreement to arbitrate. Because the defendants are challenging the validity of the arbitration clause, West Virginia law becomes just as important as federal law in determining whether to compel arbitration. Further, the source of law factor is less significant where the state and federal courts have concurrent jurisdiction. Moses H. Cone, 460 U.S. at 25.

It is difficult for this Court to evaluate the last factor, which is whether the state court proceeding will be adequate to protect the plaintiffs' rights, because the state court has already ruled on the motion to compel arbitration. The state court order demonstrates that the court considered the plaintiffs' motion to compel arbitration and to stay the proceedings in accordance with the FAA. Although the Supreme Court has never decided whether state courts are obligated to apply 9 U.S.C. § 4, the Supreme Court has stated that "state courts, as much as federal

courts, are obliged to grant stays of litigation under § 3 of the Arbitration Act." Moses H. Cone, 460 U.S. at 26. However, plaintiffs never argue that the state court did not have the jurisdiction to decide their motion to compel arbitration; they assert instead that the state court was wrong. This Court rejects the notion that federal courts have any superior abilities over their state court counterparts and has no reason to believe that Judge Wilson did not decide the plaintiffs' motion to compel arbitration and to stay in accordance with applicable federal and state law.[6]

This Court finds that the balance of these factors demonstrates "exceptional circumstances" which weigh in favor of abstention. This action was not filed until more than 14 months after the state court case was filed, the defendants are challenging the validity of the arbitration clause, which implicates state law, the state court forum is adequate to protect the federal plaintiffs' rights, and the state court has already ruled on the issue before this Court. To retain jurisdiction over the plaintiffs' petition to compel arbitration, while a state court has already ruled on the same motion, would not constitute "wise judicial administration." Colorado River, 424 U.S. at 817.

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[6] This Court does not decide whether it agrees with the state court ruling, but whether this Court agrees is irrelevant because it cannot act as an appellate court to the West Virginia court. On September 28, 2001, the state court entered an order stating that "the order denying arbitration entered on June 11, 2001, is appealable by writ of prohibition or by direct appeal under W. Va. Code § 58-5-1 . . . ." Defs.' Ex. 1 to Supp. Memo. In Support of Mot. to Dismiss. Therefore, if the plaintiffs believe that the state court made an erroneous ruling, they may file an appeal with the West Virginia Supreme Court of Appeals. Further, even though the West Virginia Supreme Court 's decision to hear an appeal is discretionary, it is not a reason for this Court to act as an alternative appellate court.

D. The Other Motions

Because this Court finds that defendants' motion to dismiss should be granted, plaintiffs' motion to compel arbitration should, accordingly, be denied.

This Court also finds that defendants' motion for an award of attorneys' fees and expenses of litigation should be denied because this Court does not believe that statutory or common law permits this Court to award attorneys' fees pursuant to Federal Rule of Civil Procedure 54(d).

This Court further finds that American Reliable's motion for sanctions pursuant to Federal Rule of Civil Procedure 11 should be denied because the defendants' motion for attorneys' fees was not filed for any improper purpose such as to harass or cause unnecessary delay or needless increase in the cost of litigation. Although this Court does not agree with the defendants' argument that attorneys' fees should be granted, this Court does not find that the defendants' argument was frivolous.

This Court further finds that defendants' motion to strike plaintiffs' reply memorandum in support of motion to compel arbitration should be denied because the plaintiffs' reply was timely filed.

Lastly, there being no objection to plaintiffs' motion for leave to file instanter a surreply memorandum in opposition to defendants' motion to dismiss, the plaintiffs' motion should be granted.

IV. Conclusion

For the reasons set forth above, the defendants' motion to dismiss is hereby GRANTED. This court further finds that plaintiffs' motion to compel arbitration is DENIED; defendants' motion for attorneys' fees and expenses of litigation is DENIED; plaintiffs' motion for Rule 11 sanctions is DENIED; defendants' motion to strike is DENIED; and plaintiffs' motion for leave to file a surreply is GRANTED. It is further ORDERED that this action be DISMISSED and STRICKEN from the active docket of this Court.

IT IS SO ORDERED.

The Clerk is DIRECTED to transmit copies of this order to counsel of record herein. Pursuant to Federal Rule of Civil Procedure 58, the Clerk is DIRECTED to enter judgment on this matter.

DATED: March 18, 2002

/s/ Frederick P. Stamp, Jr.
FREDERICK P. STAMP, JR.
UNITED STATES DISTRICT JUDGE

APPENDIX B

No. 012231

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

AMERICAN RELIABLE INSURANCE COMPANY, AMERICAN BANKERS INSURANCE COMPANY OF FLORIDA, and CAMPBELL INSURANCE SERVICES, INC.,

Petitioners,

v.

ROBERT STILLWELL and HELEN STILLWELL,

Respondents.

From the Circuit Court of Ohio County, West Virginia
Civil Action No. 00-C-116W

PETITIONERS' EMERGENCY MOTION TO EXTEND STAY OF CIRCUIT COURT PROCEEDINGS PENDING RESOLUTION OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES SUPREME COURT

* * *

* * *

ARGUMENT

* * *

Indeed, like the U.S. Supreme Court, this Court has noted in the context of appellate review of arbitration orders that "to compel [Petitioners] to proceed through the trial process and then appeal to this Court would be inefficient, and **a waste of the time and resources** of the circuit court and of this Court." *State ex rel. Ranger Fuel Corp. v. Lilly*, 165 W. Va. 98, 101, 267 S.E.2d 435, 437 (1980) (emphasis added).

* * *

* footnote omitted.

At page 4 of motion filed by Petitioners in the state supreme court on June 17, 2002.

Supreme Court, U.S.
FILED
JUL 23 2002
CLERK

(3)

No. 01-1842

In the Supreme Court of the United States

AMERICAN RELIABLE INSURANCE COMPANY,
AMERICAN BANKERS INSURANCE COMPANY OF FLORIDA,
AND CAMPBELL INSURANCE SERVICES, INC.,
Petitioners,

v.

ROBERT STILLWELL AND HELEN STILLWELL,
Respondents.

On Petition for Writ of Certiorari to the
Supreme Court of Appeals of West Virginia

PETITIONERS' REPLY BRIEF

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**Counsel of Record*

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RULE 29.6 STATEMENT

There is no change to the Petitioners' Rule 29.6 corporate disclosure statement as set forth in the Petition for Writ of Certiorari.

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PETITIONERS' REPLY BRIEF

Conspicuously absent from Respondents' opposition is any citation to a West Virginia statute or state supreme court decision which provides a person in the West Virginia state court system with the *right* to appeal from a trial court order denying a motion to compel arbitration or to stay judicial proceedings under the FAA. The reason for this glaring omission is simple – no such statute or case law exists. West Virginia has refused to provide a right to appeal as set forth in section 16(a)(1) of the FAA and implemented by approximately 45 other states.[1] Instead, West Virginia continues to destroy federally protected arbitration rights by forcing persons who suffer an erroneous trial-level arbitration ruling to endure full blown civil litigation and a trial on the merits. West Virginia will continue to thwart federal law under the FAA in direct conflict with this Court's decision in *Southland Corp.*,[2] section 16 of the FAA, and the decisions of other state supreme courts,[3] unless this Court grants the Petition.

The Respondents offer no colorable argument for denying the Petition. Instead, they interpose an irrelevant and misleading discussion of a *separate* federal district court proceeding which, if anything, illustrates why the Petition should be granted,[4] and they falsely contend that Petitioners

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[1] *See* Petition for Writ of Certiorari ("Petition") at 14-15 & nn. 6-7; *id.* at 10-11.

[2] *Southland Corp. v. Keating*, 465 U.S. 1, 7-8 (1984) ("to delay review of a state judicial decision denying enforcement of the contract to arbitrate until the state court litigation has run its course would defeat the core purpose of a contract to arbitrate").

[3] *See* Petition at 10–11 and cases cited therein.

[4] On May 18, 2001, prior to the state court's ruling on the motion to compel arbitration, the Petitioners filed a petition in the U.S. District

(continued...)

have "misrepresented" the holding and effect of the West Virginia Supreme Court's decision in this case. The Respondents' arguments are entirely without merit.[5]

I. There Is No Question That The West Virginia Supreme Court In This Case Refused To Provide An Appeal To Review The Merits Of The Trial Court's Arbitration Order, Nor Is There Any Question That West Virginia Refuses To Recognize A Right To Appeal From An Order Denying A Motion To Compel Arbitration Under The FAA

The Respondents contend that, "[f]ar from denying an appeal," the West Virginia Supreme Court actually "*invites*" an appeal, and the state supreme court intends "to consider federal law if and when the record below is sufficiently mature to allow a reasoned determination." Opp. 3 (emphasis in original). This

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[4] (...continued)
Court for the Northern District of West Virginia to compel arbitration and stay judicial proceedings pursuant to sections 3 and 4 of the FAA. Because the state court ruled on June 11, 2001, the district court subsequently dismissed the independent federal action for lack of subject matter jurisdiction under the *Rooker-Feldman* doctrine, finding that the federal petition would be the "'functional equivalent' of an appeal from the June 11, 2001 state court decision." App., *infra*, 9a. The federal district court's refusal to entertain an independent action under the FAA makes it even more important that the state court provide an immediate appeal from the trial court's arbitration order.

[5] As discussed *infra*, the Respondents also argue, contrary to this Court's decision in *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 32 (1991), that the clause is unenforceable because it does not allow them to pursue a class action; and they argue that the trial court's order is "consistent" with federal law (Opp. 7) by completely ignoring the conflict with *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 281 (1995) (discussed at pages 19 to 20 of the Petition).

argument is unsupportable. There is absolutely no basis for suggesting that the West Virginia Supreme Court is "inviting" another interlocutory appeal. The West Virginia Supreme Court refused to hear an appeal on two separate occasions – once on a petition for writ of prohibition, and a second time in connection with a petition for appeal. Petition at 8-9. The West Virginia Supreme Court did not remand with any instructions to the trial court to reconsider its arbitration ruling or to determine any additional facts, and the record is clear that there are no "issues of fact and of state law" which need to be determined. Opp. 3 (*quoting* West Virginia Supreme Court's decision, Petition, App. 14a). To the contrary, the trial court made a final ruling that it was not going to compel arbitration,[6] and the state supreme court plainly refused to review that decision. In addition, the state supreme court refused to review the trial court's failure to stay judicial proceedings, a ruling which is also immediately appealable under section 16(a)(1)(A) of the FAA.

There is no question that the West Virginia Supreme Court in this case denied any review on the merits and let stand a trial court order which had held that the arbitration provision at issue was unenforceable because it was "not bargained for." Petition, App. 1a. The trial court had further determined without basis in law or fact that the FAA "does not apply" in this case. *Id.* at 4a. Both of these rulings were directly contrary to federal law. Petition at 19-21, 12-13. The integrity of the FAA requires that both holdings be subject to immediate review, but the West Virginia Supreme Court "held" that the Petitioners did

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[6] The trial court also refused to certify its order for interlocutory appeal under W. Va. Code § 58-5-2 "because such certification would result in a stay of discovery which the [trial] [c]ourt [was] reluctant to grant." Petition, App. 4a. The trial court further held that it "ha[d] decided that the Federal Arbitration Act does not apply to this action," and it "decline[d] to reconsider its June 11, 2001 order." *Id.*

not have a right to any such appeal.[7] It is this interpretation of its own procedural rules in derogation of federal rights which is preempted by the Supremacy Clause and which should be reviewed by granting the Petition.

The issue here is not whether an appeal should be provided at the end of the litigation process, but whether an immediate interlocutory appeal – like the mandated by §§ 16(a)(1)(A) and (B) of the FAA – is required in order to avoid frustration and derogation of the "liberal federal policy favoring arbitration agreements." *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983). That three justices of the West Virginia Supreme Court characterized the arbitration issue as "premature" as a subterfuge for denying review (Opp. 3), manifests only that this majority harbors a legally erroneous view of when an anti-arbitration decision must be reviewed in order to safeguard federal arbitration rights. The FAA and the Supremacy Clause require that the order be reviewed immediately without delay in order to protect "the core purpose of a contract to arbitrate." *Southland Corp.*, 465 U.S. at 7-8.[8]

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[7] Respondents make the absurd accusation that Petitioners "misrepresented" that the West Virginia Supreme Court "held" that it was not required to provide an immediate interlocutory appeal. Opp. 4. Notwithstanding Respondent's misguided view, *that is exactly what the state appellate court held*, especially in light of the fact that Petitioners argued expressly to the West Virginia Supreme Court (twice – once in the petition for writ of prohibition, and again in the petition for appeal) that the state court was required by the FAA to provide an appeal, and a majority of the state supreme court (3 to 2) rejected the argument and refused to provide the appeal.

[8] This Court should note that there is no guarantee that the West Virginia Supreme Court will *ever* review on appeal the merits of the trial court's order denying arbitration in this case (or any other case), even after final judgment. All appeals to the West Virginia Supreme

(continued...)

The Respondents also argue without support that "the West Virginia Supreme Court of Appeals grants appellate review appropriately in arbitration cases." Opp. 5. To the contrary, West Virginia rarely grants any useful review of arbitration denials, and most importantly, it did not do so here.[9] Persons with binding arbitration agreements who are aggrieved by trial court error in West Virginia are inevitably bogged down in a quagmire of litigation. Not only does West Virginia not provide any clear appeal as of right, but it presents three different confusing and overlapping appellate "possibilities," all of which are purely discretionary.[10] The aggrieved person can pursue all three options and still not obtain any review of the arbitration order. That is exactly what happened to the Petitioners here. Petition at 7-9. This system greatly escalates the costs of enforcing arbitration rights, and forces persons who do not have sufficient litigation resources to simply abandon their federal arbitration rights.

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[8] (...continued)
Court are treated as discretionary.

[9] Respondents quote a motion in which Petitioners asked the West Virginia Supreme Court to stay the trial court proceedings pending a Petition to this Court as support for the proposition that Petitioners have "contradict[ed] their representation to this Court," and have "acknowledge[d] that the West Virginia Supreme Court of Appeals grants appellate review appropriately in arbitration cases." Opp. 5. Respondents' argument is nonsensical. The fact that the West Virginia Supreme Court, on occasion, has allowed an appeal (or writ of prohibition) concerning an arbitration order hardly means that it "grants appellate review appropriately in arbitration cases."

[10] The three possibilities are (1) moving in the trial court to certify the erroneous arbitration order for interlocutory appeal pursuant to W. Va. § 58-5-2, (2) filing a petition for writ of prohibition with the Supreme Court of Appeals of West Virginia, and (3) filing a petition for appeal with the state supreme court.

In the final analysis, the Respondents have not and cannot dispute that West Virginia does not provide the right to an immediate appeal, as set forth in section 16(a)(1) of the FAA, 9 U.S.C. § 16(a)(1). Rather, West Virginia continues to frustrate federal arbitration law in direct conflict with this Court's prior decisions interpreting the FAA and the decisions of other states' highest courts. This Court should grant the Petition and eliminate these conflicts.

II. The Dismissal Of Petitioners' Independent Federal Action To Compel Arbitration For Lack Of Subject Matter Jurisdiction Serves Only To Enforce The Need For The Petition, And The Order Of Dismissal Was Not A Required Part Of Petitioners' Appendix

Respondents begin their brief (Opp. 2) with the frivolous argument that Petitioners violated Supreme Court Rule 14(i)(ii) by not including in their Appendix a copy of an order in a *different case* which was previously dismissed by the U.S. District Court for the Northern District of West Virginia for lack of subject matter jurisdiction (hereinafter the "FAA Petition").[11] Respondents' argument is frivolous because the portion of Rule 14(i)(ii) cited by Respondents expressly applies only to *relevant* orders *in the same case*. The FAA Petition was not the same case; rather, it was an independent proceeding brought in a different court under sections 3 and 4 of the FAA, 9 U.S.C. §§ 3, 4.[12]

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[11] *American Reliable Ins. Co. v. Stillwell*, Case No. 5:01CV59 (Stamp) (N.D. W. Va.) (complaint/petition filed May 18, 2001).

[12] Rule 14(i)(ii) also provides that certain orders "in companion cases" are to be included in an appendix "if reference thereto is necessary to ascertain the grounds of the judgment." Sup. Ct. R. 14(i)(ii). Respondents correctly do not quote that portion of the rule, conceding as they must that it has no application here.

In addition to citing an inapplicable court rule, the Respondents err by suggesting that the order dismissing the FAA Petition somehow aids their position here. The order dismissing the FAA Petition is irrelevant to this Petition (another reason it is not required in the Appendix), but to the extent it has any significance, it serves only to highlight the damage to federal arbitration rights caused by the West Virginia Supreme Court's refusal to provide a right to appeal. The federal district court dismissed the FAA Petition for lack of subject matter jurisdiction under the *Rooker-Feldman* doctrine, holding that it was not permitted to act in an appellate capacity to the state trial court. *See* App., *infra*, 9a. If this ruling is correct, Petitioners (and other similarly situated persons) would be barred from compelling arbitration through the federal district court system, and Petitioners' sole avenue for review of the trial court's arbitration order would be in the state appellate system. Consequently, the order dismissing the FAA Petition, if it has any significance to this proceeding, illustrates the need for this Court to grant the Petition and correct West Virginia law.

The Respondents imply that the FAA Petition has some relevance to the state court case because the federal district court, after finding that it had no subject matter jurisdiction, went further and opined that "the insurer waived arbitration." Opp. 3. Respondents fail to mention, however, that the state trial court's order in this case was not based on waiver (rendering the district court's opinion completely irrelevant), and the district court's opinion on waiver could not affect this Petition because it did not apply to all of the Petitioners. App., *infra*, 12a ("any finding of waiver should not apply to American Bankers because American Bankers was not added to the case until the plaintiffs amended their complaint"). Moreover, because the district court held that it lacked subject matter jurisdiction, its discussion of waiver was improper and

unnecessary dicta which, as a matter of law, it not binding on the state court.[13]

III. Respondents' Discussion Of Whether The Arbitration Clause Speaks To "Class Claims" Is Erroneous And Irrelevant to the Petition

Respondents next make the argument that the arbitration provision is unenforceable because it is "silent as to class claims." Opp. 5. Apparently, Respondents believe that an arbitration agreement must "speak to class claims" in order to be enforceable under the FAA. *See id.* Even if this interesting theory had any merit (which it clearly does not),[14] the issue has

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[13] Absent subject matter jurisdiction, "the court cannot proceed at all in any cause. Jurisdiction is power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause." *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 94 (1998) (quoting *Ex parte McCardle*, 7 Wall. 506, 514 (1868)) (emphasis added); *see also Mayor v. Cooper*, 73 U.S. 247 (1867) (holding that if there was no jurisdiction, there was no power to do anything but strike the case from the docket). For a court to address the merits when it lacks subject matter jurisdiction is, "by very definition, for a court to act ultra vires." *Steel Co.*, 523 U.S. at 102. Dismissal of a case for lack of subject matter jurisdiction carries no claim preclusive effects. *Shoup v. Bell & Howell Co.*, 872 F.2d 1178, 1180 (4th Cir. 1989). Moreover, the district court's finding of waiver was erroneous because all Petitioners filed a motion to compel arbitration within 30 days of the Respondents' amended complaint which had changed the entire nature of the dispute. The district court's order has been appealed to the Fourth Circuit.

[14] Under Respondents' theory, a party could avoid an arbitration agreement by simply requesting a class action. This is clearly not the law. *See, e.g., Randolph v. Green Tree Fin. Corp.*, 244 F.3d 814, 818-19 (11th Cir. 2001) (rejecting argument that arbitration

(continued...)

absolutely nothing to do with the questions presented in the Petition, and it was waived by the Respondents because they never raised it with the trial court prior to the time the petition for appeal was filed.[15]

IV. There Is No Merit To Respondents' Argument That Application Of West Virginia's "Bargained For" Doctrine Was Consistent With Federal Law

The trial court in this case applied the West Virginia "bargained for" doctrine to single out and invalidate the arbitration provision by requiring that the arbitration clause be separately bargained for. *See* Petition, App. 2a ("Defendants proffered no evidence that the parties to this contract knowingly

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[14] (...continued)
agreement was unenforceable because plaintiffs would not be able to bring a class action); *Johnson v. West Suburban Bank*, 225 F.3d 366, 379 (3d Cir. 2000) (same); *see also Gilmer v. Interstate/ Johnson Lane Corp.*, 500 U.S. 20, 32 (1991) ("even if the arbitration could not go forward as a class action or class relief could not be granted by the arbitrator, the fact that [a statute] provides for the possibility of bringing a collective action does not mean that individual attempts at conciliation were intended to be barred") (citations omitted). The intermediate state appellate court decision in *Powertel* cited by Respondents (Opp. 6) is easily distinguishable because it invalidated an arbitration clause, unlike the one at issue here, which (i) prohibited the arbitrators from awarding punitive damages or equitable relief, and (ii) was not added to the contract until after the lawsuit was filed. *Powertel v. Bexley*, 743 So. 2d 570, 571-72, 576 (Fla. Dist. Ct. App. 1999).

[15] The Respondents' reference to the McCarran-Ferguson Act in a footnote (Opp. 6 n.2) is yet another erroneous sidebar with no legal relevance. The McCarran-Ferguson Act has absolutely no application here because the FAA would not "invalidate, impair, or supersede any law enacted by [West Virginia] for the purpose of regulating the business of insurance." 15 U.S.C. § 1012(b).

bargained for an arbitration clause"). It is only by completely ignoring the Petition's entire discussion of this Court's decision in *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 281 (1995), that the Respondents can argue that this application of West Virginia law is "consistent with federal law." Opp. 7. Indeed, the Respondents failure to even cite *Allied-Bruce* is a telling concession that they have no substantive response. In addition, the Respondents ignore the conflict with this Court's decision in *Moses H. Cone*, Petition at 21, and they ignore the conflict between the state court's ruling that the FAA "does not apply" and this Court's holding in *Allied-Bruce*. 513 U.S. at 277 (FAA applies to the fullest reach of the commerce clause); Petition at 6 (dispute involves parties from four different states); *id.* at 12-13 (no question that FAA applies).

Finally, Respondents close their opposition with a frivolous Seventh Amendment argument by citing four cases (Opp. 7), none of which have anything to do with arbitration agreements. The Seventh Amendment does not preclude waiver of the right to jury trial through a valid arbitration agreement. *See, e.g., Koveleskie v. SBC Capital Markets, Inc.*, 167 F.3d 361, 368 (7th Cir. 1999); *Dillard v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 961 F.2d 1148, 1155 n.12 (5th Cir. 1992).[16]

CONCLUSION

The Petition for a Writ of Certiorari should be granted.

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[16] In addition, this Court has never held that the Seventh Amendment right to jury trial applies to the states.

Respectfully submitted,

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JULY 23, 2002

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF WEST VIRGINIA

AMERICAN RELIABLE INSURANCE COMPANY,
AMERICAN BANKERS INSURANCE COMPANY
OF FLORIDA and
CAMPBELL INSURANCE SERVICES, INC.,

Plaintiffs/Petitioners,

v. Civil Action No. 5:01CV59
(STAMP)

ROBERT STILLWELL and HELEN STILLWELL,

Defendants/Respondents.

MEMORANDUM OPINION AND ORDER GRANTING DEFENDANTS' MOTION TO DISMISS, DENYING PLAINTIFFS' MOTION TO COMPEL ARBITRATION, DENYING DEFENDANTS' MOTION FOR ATTORNEYS' FEES AND EXPENSES OF LITIGATION, DENYING PLAINTIFFS' MOTION FOR RULE 11 SANCTIONS, DENYING DEFENDANTS' MOTION TO STRIKE AND GRANTING PLAINTIFFS' MOTION FOR LEAVE TO FILE SURREPLY

I. Introduction

Pending before this Court is the motion to dismiss of defendants/respondents, Robert and Helen Stillwell. Also, pending before this Court is the joint motion to compel arbitration of plaintiffs/petitioners, American Reliable Insurance Company ("American Reliable"), American Bankers Insurance Company of Florida ("American Bankers"), and

Campbell Insurance Services, Inc. ("Campbell") (collectively "plaintiffs"), as well as several other motions.[1] This Court has now reviewed the motions and memoranda in support thereof and in opposition thereto. For the reasons set in this opinion, this Court finds that defendants' motion to dismiss should be granted, plaintiffs' motion to compel arbitration of defendants' claims should be denied, defendants' motion to strike should be denied, defendants' motion for attorneys' fees and expenses of litigation should be denied, Campbell's motion for leave to file surreply should be granted, and American Reliable's motion for Rule 11 sanctions should be denied.

II. Facts

The defendants purchased an American Reliable mobile home owners policy on or about February 9, 1999, which contained an arbitration clause.[2] On April 9, 1999, the defendants sustained a casualty loss to their property.

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[1] The other motions pending before this Court include a motion by defendants Stillwell to strike plaintiffs' reply memorandum in support of motion to compel arbitration, motion by defendants for attorneys' fees and expenses of litigation, motion by plaintiff Campbell for leave to file instanter, a surreply memorandum of law in opposition to defendants' motion to dismiss, and a motion by plaintiff American Reliable for Rule 11 sanctions.

[2] The arbitration clause stated:

> Any and all disputes, controversies or claims of any kind and nature between you and us arising out of or in any way related to the validity, interpretation, performance or breach of any provisions in this policy, and upon which a settlement has not been reached by you and us, shall be resolved exclusively, by arbitration in accordance with the Federal Arbitration Act. (9 U.S.C. § 1, ET SEQ.)

American Reliable Ins. Co. Spec. Mobile Homeowners Policy at 9.

Defendants claim that the loss was covered by the American Reliable insurance policy, but American Reliable claims that the loss was not covered by the policy. Nevertheless, American Reliable settled the plaintiffs' property damage claim for $9,200.00. The defendants then filed a lawsuit in the Circuit Court of Ohio County, West Virginia on February 29, 2000 claiming that American Reliable and certain purported agents breached the insurance policy agreement, engaged in a series of unfair claims settlement practices, acted in bad faith in settling the defendants' claim, used an unlicensed insurance adjuster, and violated West Virginia insurance law. American Reliable and Campbell filed an answer offering 14 affirmative defenses, none of which referred to their desire to arbitrate the claims in accordance with the arbitration clause. The defendants Stillwell subsequently filed a motion for leave to amend their complaint, which was granted on April 2, 2001. The amended complaint added class action allegations and added American Bankers as a defendant. American Reliable and Campbell filed an answer to the amended complaint, which contained 23 affirmative defenses. The 21st affirmative defense did mention the existence of the arbitration clause.

The plaintiffs participated in the state court proceedings for 14 months prior to filing their joint motion to compel arbitration and to stay judicial proceedings on May 1, 2001.[3] The plaintiffs, along with a co-defendant not named in the action before this Court, filed a joint motion to compel

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[3] American Reliable as well as a co-defendant not named in the action before this Court filed a crossclaim against another co-defendant not named in the action before this Court in May 2000. The plaintiffs have also answered discovery, entered into agreements concerning discovery, attended hearings, and have been ordered to produce documents that were withheld from discovery. The state court also entered an order preserving evidence in possession of Campbell and an agreed scheduling order endorsed by American Reliable and Campbell.

arbitration and to stay judicial proceedings in the state court pursuant to the Federal Arbitration Act ("FAA"), 9 U.S.C. § 1, et seq.[4] On May 18, 2001, the plaintiffs filed a complaint and petition to compel arbitration in this Court.[5] On June 11, 2001, the state court entered an order denying plaintiffs' motion to compel arbitration and stay judicial proceedings based upon the fact that the state court found the insurance contract to be a contract of adhesion and that there was no evidence that the parties to the contract knowingly bargained for an arbitration clause. On June 13, 2001, after the state court entered its order denying the motion to compel arbitration, a summons was issued and returned executed to this Court as to the defendants. On June 22, 2001, the plaintiffs filed a joint motion to compel arbitration and memorandum in support in this Court. In their memorandum in support of their motion to compel arbitration, the plaintiffs state:

> On June 11, 2001, the state court issued an erroneous ruling which failed to follow Federal law under the FAA and which denied the motion to compel arbitration on the ground that the arbitration clause had not been separately "bargained for." . . . The state court's decision denying arbitration is directly contrary to binding United States Supreme Court authority under the FAA, which firmly holds that a court may not

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[4] Section 3 of the FAA provides for a stay of the proceedings when issues in the proceedings are referable to arbitration and Section 4 allows a party to petition for an order compelling arbitration when one party has failed, neglected, or refused to comply with an arbitration agreement in that civil action.

[5] It should be noted that the plaintiffs could not remove the state court case to this Court because one of the named defendants in the state court action was a resident of West Virginia and therefore complete diversity was not present.

> discriminate against an arbitration clause by enforcing all other provisions of a contract but not its arbitration clause. Allied-Bruce Terminex Cos. v. Dobson, 513 U.S. 265, 277 (1995). Accordingly, the Petitioners hereby move this Court to enforce Federal law under the FAA and to enter an Order compelling the parties' dispute to arbitration.

Mem. in Supp. of Mot. to Compel Arbitration at 4. On June 29, 2001, the defendants filed a motion to dismiss and memorandum in support based upon (1) the Rooker-Feldman doctrine; (2) the Younger abstention doctrine; (3) the "wise judicial administration" doctrine; (4) res judicata and/or collateral estoppel; (5) lack of jurisdiction over the subject matter of this action; (6) that the relief sought by the plaintiffs cannot be granted because arbitration cannot be compelled against the policyholders; and (7) the Full Faith and Credit Act, 28 U.S.C. § 1738.

III. Discussion

A. Subject Matter Jurisdiction

The defendants make several arguments in their motion to dismiss, two of which focus on their contention that this Court lacks subject matter jurisdiction over this action. "The FAA does not create independent federal question jurisdiction under 28 U.S.C. § 1331. A federal district court has jurisdiction over a petition filed under the FAA only when the plaintiffs establish an independent basis of jurisdiction, such as diversity of citizenship." Cigna Healthcare of St. Louis, Inc. v. Kaiser, 181 F.Supp.2d 914, 919 (N.D. Ill. 2002) (citing Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 25 n.32 (1983)). Although defendants argue that this Court does not have jurisdiction over this matter pursuant to 28 U.S.C. § 1332,

this Court finds that complete diversity does exist and the amount in controversy exceeds $75,000.00.

Defendants also contend that this Court lacks subject matter jurisdiction under the Rooker-Feldman doctrine. The Rooker-Feldman doctrine provides that "'a United States District Court has no authority to review final judgments of a state court in judicial proceedings.'" Brown & Root, Inc. v. Breckenridge, 211 F.3d 194, 198 (4th Cir. 2000) (quoting District of Columbia Court of Appeals v. Feldman, 460 U.S. 462, 482 (1983)). The Rooker-Feldman doctrine also bars consideration of any claim that is "inextricably intertwined" with the state court decision. See id. This means that a federal district court cannot consider a claim that, although not actually decided by the state court, requires the federal court to determine that the state court wrongly decided the issues before it. See id. (citing Plyler v. Moore, 129 F.3d 728, 731 (4th Cir. 1997)). The Rooker-Feldman doctrine also applies to interlocutory orders issued by state courts. See id. at 199. The basic principle of the doctrine is that "'[a] party losing in state court is barred from seeking what in substance would be appellate review of the state judgment in a United States district court, based on the losing party's claim that the state judgment itself violates the loser's federal rights.'" Id. at 198 (quoting Johnson v. De Grandy, 512 U.S. 997, 1005-06 (1994)).

The defendants argue that the plaintiffs' federal complaint is an impermissible collateral attack on a state court decision. The plaintiffs argue in response that this case is a separate parallel petition under the FAA, which has been expressly approved by federal courts and is not the type of federal appeal of a state court action to which the Rooker-Feldman doctrine applies. Plaintiffs contend that because they filed their federal court petition before the state court ruled on the merits of their motion to compel arbitration, the federal

petition cannot be characterized as an appeal, and therefore, the Rooker-Feldman doctrine does not apply.

The plaintiffs rely on the case of Doctor's Assocs., Inc. v. Distajo, 107 F.3d 126 (2d Cir. 1997), to stand for the proposition that the Rooker-Feldman doctrine is inapplicable in a case where the federal court petition to compel arbitration was filed prior to the state court denying a motion to compel arbitration. However, the facts in Distajo differ greatly from the facts of the case at hand.

In Distajo, several franchisees brought suit in the state courts in Illinois, Pennsylvania, Massachusetts and North Carolina against Doctor's Associates, Inc. ("DAI") alleging fraud, various breaches of the franchise agreement, and seeking a declaration that the arbitration clause in the franchise agreement was unenforceable. See id. at 128. DAI did not file a motion to compel arbitration in state court, but instead filed a motion to compel in federal court as well as a written demand for arbitration with the American Arbitration Association. See id. In one of the cases, the franchisees moved for and obtained default judgment against DAI because DAI did not appear in the state court action. See id. at 137. After default judgment was obtained, the federal court granted DAI's petition to compel arbitration of those franchisees' claims and entered a preliminary injunction enjoining the franchisees from further prosecuting their state court suit. See id. The Second Circuit reversed the district court's order and vacated the preliminary injunction/temporary restraining order ("TRO"). See id. The district court then entered a TRO enjoining the franchisees from prosecuting their state suit. See id. However, the franchisees did not advise the state court of the TRO. See id. The state court, upon being advised of the Second Circuit's decision lifting the injunction, awarded the franchisees $400,000.00 in damages. See id. The franchisees then argued that the state court judgment stripped the district court of subject matter

jurisdiction to entertain DAI's petition to compel arbitration. See id. On appeal, the Second Circuit held that "DAI filed its petitions to compel arbitration of the franchisees' state actions before the state courts had made any rulings on the merits in those actions." Id. at 138 (citations omitted). On these facts, the Second Circuit found that the district court did not lack jurisdiction under Rooker-Feldman to adjudicate DAI's petitions to compel arbitration. See id.

Another case relied on by the plaintiffs is Central Reserve Life Ins. Co. v. Marello, No. Civ. A. 00-3344, 2001 WL 41129 (E.D. Pa. Jan. 17, 2001). In Marello, Marello filed a complaint in state court against her health insurance company, Central Reserve Life Insurance Company, on June 6, 2000. See id. at *1. Central Reserve promptly filed its federal complaint and motion to compel arbitration on June 30, 2000. See id. It also filed preliminary objections to Marello's state court complaint on July 5, 2000, raising, in part, the arbitrability of Marello's claim under the FAA. See id. The state court overruled Central Reserve's preliminary objections on September 20, 2000 and the federal court subsequently granted Central Reserve's motion to compel on October 4, 2000. See id. The court found that "[a]t the time it was filed, Central Reserve's Motion to Compel Arbitration was neither a direct appeal from an adverse state ruling, nor the functional equivalent thereof." Id. at *4. Accordingly, the court found that the Rooker-Feldman doctrine was not implicated because there was no ruling on the merits from which to appeal. See id.

These cases can be distinguished from the case currently pending before this Court. In this case, although the plaintiffs may have filed a complaint and petition to compel arbitration in this Court before the state court entered its order denying their state court motion to compel arbitration, they did not file a memorandum in support of their motion to compel with this Court until after the state court ruling. Also, the plaintiffs'

memorandum in support of their motion to compel arbitration contends that the state court issued an erroneous ruling, which failed to follow federal law under the FAA. Further, a summons on the complaint was not returned executed as to the defendants until June 13, 2001, which was after the state court ruling.

This Court finds that this particular factual situation renders the plaintiffs' motion to compel arbitration a "functional equivalent" of an appeal from the June 11, 2001 state court decision. This is not a case where the plaintiffs, from the beginning, asked this Court to compel arbitration, but rather one in which the plaintiffs attempted to shop between two forums in order to gain a strategic advantage. Although this Court recognizes that it is proper for a party to file a motion in federal court seeking an order compelling arbitration under the FAA while the underlying state court proceeding remains pending, it is not proper for a party to file two of the same motions in both state court and federal court and to then wait until after the state court renders an unfavorable ruling before the party pursues its motion in federal court. Plaintiffs were clearly looking for the proverbial "two bites of the apple" by filing a motion to compel arbitration in both the state and federal court. Not only do the plaintiffs practically contend in their memorandum in support of their motion to compel that they are appealing the state court order, but their failure to actively pursue their complaint and petition to compel arbitration until after the state court ruling clearly demonstrates that this is a functional equivalent of an appeal of a state court order. Accordingly, this Court finds that the Rooker-Feldman doctrine applies and that this Court lacks subject matter jurisdiction to decide this case.

B. Waiver

However, even if this Court were to find that it did have subject matter jurisdiction, this Court finds that the plaintiffs have waived their right to insist on arbitration. "Under the Federal Arbitration Act, a party may demand a stay of federal judicial proceedings pending exercise of a contractual right to have the subject matter of the federal action decided by arbitration, unless the party seeking arbitration is 'in default' of that right." MicroStrategy Inc. v. Lauricia, 268 F.3d 244, 249 (4th Cir. 2001) (quoting Maxum Founds., Inc. v. Salus Corp., 779 F.2d 974, 981 (4th Cir. 1985)); see also 9 U.S.C. § 3. Although "default is akin to waiver," any doubts as to whether the party has waived its right to compel arbitration, must be resolved in favor of arbitration. Id. The Fourth Circuit has held:

> A party may waive its right to insist on arbitration if the party "so substantially utiliz[es] the litigation machinery that to subsequently permit arbitration would prejudice the party opposing the stay." . . . But even in cases where the party seeking arbitration has invoked the "litigation machinery" to some degree "[t]he dispositive question is whether the party objecting to arbitration has suffered actual prejudice.

Id. at 249 (citations omitted). "The party opposing arbitration 'bears the heavy burden of proving waiver.'" Id. at 250 (quoting American Recovery Corp. v. Computerized Thermal Imaging, Inc., 96 F.3d 88, 95 (4th Cir. 1996)).

A court may consider the delay in seeking arbitration when determining whether a waiver occurred. See id. at 250. There is no doubt that the plaintiffs delayed in seeking arbitration for over a year after the complaint was filed. The contention that the claim may be arbitrable was never raised

until the plaintiffs filed their answer and affirmative defenses to the amended complaint and their motion to compel arbitration in state court approximately 14 months after the proceedings began and then filed their motion to compel in this Court 18 days after they filed their state court motion to compel.

However, this Court is aware that "mere delay, without more, will not suffice to constitute a waiver." Maxum Founds., Inc., 779 F.2d at 982. This Court must also look at whether the plaintiffs waived their right to insist on arbitration by virtue of their litigation activities in the state court. See MicroStrategy, Inc., 268 F.3d at 250. This requires the Court to look at whether the plaintiffs' litigation in state court centered around the defendants' arbitrable claims. See id. at 251. This Court finds that the litigation in the state court did, in fact, center around the claims that the plaintiffs now contend are arbitrable. Accordingly, the plaintiffs' litigation activities in the state court can be used in support of the argument that the plaintiffs have waived their right to insist on arbitration.

In determining whether a party waived its right to seek arbitration, this Court must also examine whether the party objecting to arbitration has suffered actual prejudice. "[P]rejudice . . . refers to the inherent unfairness -- in terms of delay, expense, or damage to a party's legal position -- that occurs when the party's opponent forces it to litigate an issue and later seeks to arbitrate that same issue." Distajo, 107 F.3d at 134. This Court finds that the defendants have suffered actual prejudice for several reasons. First, even though they were aware of their right to arbitrate, the plaintiffs proceeded to litigate the state court case for a period of 14 months before they even mentioned that they wished to enforce the arbitration provision in the contract. Second, not only did the plaintiffs delay in seeking to compel arbitration, but their litigation in state court centered around the defendants' arbitrable claims. Third, significant discovery has already taken place in the state

court. Fourth, the state court denied plaintiffs' motion to compel arbitration before plaintiffs actively pursued their motion to compel arbitration in this Court. The plaintiffs submitted their motion to compel to one forum and then when they were disappointed with the result in that forum, actively pursued a motion to compel in the other forum. The plaintiffs' willing participation in the litigation in the state court forum was inconsistent with a desire to arbitrate. Accordingly, this Court finds that the defendants have suffered the type of prejudice that supports a finding of waiver. Although the defendants bear a heavy burden of proving waiver and each factor, considered separately, does not support waiver, taken together, these factors demonstrate that the plaintiffs have waived their right to insist on arbitration.

Even if this Court were to conclude that it had subject matter jurisdiction, and even if this Court were to find that the plaintiffs did not waive their right to insist on arbitration, this Court finds that it should abstain from deciding the plaintiffs' motion to compel arbitration. However, before moving on to the abstention analysis, this Court notes that it agrees with the plaintiffs' argument that any finding of waiver should not apply to American Bankers because American Bankers was not added to the case until the plaintiffs amended their complaint on April 2, 2001. American Bankers delayed only a month in asserting arbitration rights. However, because this Court finds that it does not have subject matter jurisdiction over this matter and because this Court finds that it must abstain from ruling on the motion to compel, the fact that American Bankers did not waive its arbitration rights has no effect on this Court's ultimate decision to dismiss the case.

C. Abstention

In their motion to dismiss, defendants argue that this Court should dismiss this action based on Younger v. Harris,

401 U.S. 37 (1971), and the "wise judicial administration" doctrine enunciated in Colorado River Water Conservation Dist. v. United States, 424 U.S. 800 (1976).

In Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1 (1983), the Supreme Court addressed the question of whether a federal district court may abstain from hearing a motion to compel arbitration out of deference to the parallel litigation brought in state court. See id. at 935. The Court found that Colorado River provided persuasive guidance in deciding the question before it. See id. The Court in Colorado River held that in certain "exceptional" circumstances, a federal court may abstain from exercising its subject matter jurisdiction due to the existence of a concurrent state court proceeding, based upon "considerations of '[w]ise judicial administration, giving regard to conservation of judicial resources and comprehensive disposition of litigation.'" Colorado River, 424 U.S. at 817 (citations omitted).

The Moses Court identified the four factors in Colorado River as well as two additional factors that a district court must consider when deciding whether to abstain from exercising its jurisdiction due to the concurrent jurisdiction of a state court. These factors are: (1) whether either court has assumed jurisdiction over any res or property; (2) whether the federal forum is any less convenient to the parties than the state forum; (3) the avoidance of piecemeal litigation; (4) the order in which jurisdiction was obtained by the concurrent forums; (5) whether federal or state law provides the rule of decision on the merits; and (6) the adequacy of the state court proceedings to protect the federal plaintiff's rights. The Court stated that "the decision whether to dismiss a federal action because of parallel state-court litigation does not rest on a mechanical checklist, but on a careful balancing of the important factors as they apply in a given case, with the balance heavily weighted in favor of the exercise of jurisdiction. Moses H. Cone, 460 U.S. at 16.

The first and second factors do not weigh in favor of abstention because the state court did not assume jurisdiction over any res or property and the federal forum is located in the same county and city as the state forum.

The third factor, the avoidance of piecemeal litigation, generally is not an issue in situations where there is a state court proceeding and a parallel federal court proceeding seeking to compel arbitration. See Moses H. Cone, 460 U.S. at 21 (stating that the federal arbitrability issue is easily severable from the merits of the underlying state court action). Also Colorado River stated that "the mere potential for conflict in the results of adjudications, does not, without more, warrant staying exercise of federal jurisdiction." Colorado River, 424 U.S. at 816. However, in this case, the fact that there is a "potential" for conflict, is not the only reason this Court chooses to abstain from exercising jurisdiction. "In analyzing whether a dismissal or stay will further the interest in avoiding piecemeal litigation, we look not for formal symmetry between the two actions, but for a substantial likelihood that the state litigation will dispose of all claims presented in the federal case." Lumen Const., Inc. v. Brant Const. Co., Inc., 780 F.2d 691, 695 (7th Cir. 1986) (citation omitted). In this case, the state litigation has disposed of all claims presented in this Court. Not only has the state court already decided the issue before this Court, but the plaintiffs willingly submitted the issue to the state court for a decision. Because the state court already adjudicated the issues involved in this case, there is much to be gained in judicial economy by abstaining from exercising jurisdiction.

With regard to the fourth factor, the state court obtained jurisdiction of the action more than 14 months before the plaintiffs filed their petition and motion to compel arbitration with this Court. This Court must not only look at which complaint was filed first, but now much progress has been made in the two actions. See Moses H. Cone, 460 U.S. at 22. This

Court has already discussed the fact that there has been substantial proceedings in the state court. Further, the fact that the state court has already decided the motion to compel arbitration demonstrates that the state court proceedings have progressed well ahead of the proceedings in this Court. Accordingly, the fourth factor weighs in favor of abstention.

This Court finds that the fifth factor enunciated in Moses, whether state or federal law provides the rule of decision, weighs in favor of abstention. Although "[f]ederal law governs the construction of contract language concerning arbitrability," see Smith Barney, Inc. v. Critical Health Sys. of N.C., Inc., 212 F.3d 858, 860 (4th Cir. 2000), state law governs a court's determination of whether a valid agreement to arbitrate arose between the parties. See First Options of Chicago, Inc. v. Kaplan, 514 U.S. 938, 944 (1995); Johnson v. Circuit City Stores, 148 F.3d 373, 377 (4th Cir. 1998) (citations omitted) ("Whether a party agreed to arbitrate a particular dispute is an issue for judicial determination to be decided as a matter of contract. . . . In so deciding, the court should apply 'ordinary state-law principles that govern the formation of contracts."). Thus, federal common law is relevant only to provide the basic principle that federal policy favors arbitration and ambiguities are to interpreted in favor of arbitration. West Virginia law determines the question of the validity, revocability, or the enforceability of the agreement to arbitrate. Because the defendants are challenging the validity of the arbitration clause, West Virginia law becomes just as important as federal law in determining whether to compel arbitration. Further, the source of law factor is less significant where the state and federal courts have concurrent jurisdiction. Moses H. Cone, 460 U.S. at 25.

It is difficult for this Court to evaluate the last factor, which is whether the state court proceeding will be adequate to protect the plaintiffs' rights, because the state court has already

ruled on the motion to compel arbitration. The state court order demonstrates that the court considered the plaintiffs' motion to compel arbitration and to stay the proceeding in accordance with the FAA. Although the Supreme Court has never decided whether state courts are obligated to apply 9 U.S.C. § 4, the Supreme Court has stated that "state courts, as much as federal courts, are obliged to grant stays of litigation under § 3 of the Arbitration Act." Moses H. Cone, 460 U.S. at 26. However, plaintiffs never argue that the state court did not have the jurisdiction to decide their motion to compel arbitration; they assert instead that the state court was wrong. This Court rejects the notion that federal courts have any superior abilities over their state court counterparts and has no reason to believe that Judge Wilson did not decide the plaintiffs' motion to compel arbitration and to stay in accordance with applicable federal and state law.[6]

This Court finds that the balance of these factors demonstrates "exceptional circumstances" which weigh in favor of abstention. This action was not filed until more than 14 months after the state court case was filed, the defendants are challenging the validity of the arbitration clause, which implicates state law, the state court forum is adequate to protect the federal plaintiffs' rights, and the state court has already

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[6] This Court does not decide whether it agrees with the state court ruling, but whether this Court agrees is irrelevant because it cannot act as an appellate court to the West Virginia court. On September 28, 2001, the state court entered an order stating that "the order denying arbitration entered on June 11, 2001, is appealable by writ of prohibition or by direct appeal under W. Va. Code § 58-5-1 . . . ." Defs.' Ex. 1 to Supp. Memo. in Support of Mot. to Dismiss. Therefore, if the plaintiffs believe that the state court made an erroneous ruling, they may file an appeal with the West Virginia Supreme Court of Appeals. Further, even though the West Virginia Supreme Court's decision to hear an appeal is discretionary, it is not a reason for this Court to act as an alternative appellate court.

ruled on the issue before this Court. To retain jurisdiction over the plaintiffs' petition to compel arbitration, while a state court has already ruled on the same motion, would not constitute "wise judicial administration." Colorado River, 424 U.S. at 817.

D. The Other Motions

Because this Court finds that defendants' motion to dismiss should be granted, plaintiffs' motion to compel arbitration should, accordingly, be denied.

This Court also finds that defendants' motion for an award of attorneys' fees and expenses of litigation should be denied because this Court does not believe that statutory or common law permits this Court to award attorneys' fees pursuant to Federal Rule of Civil Procedure 54(d).

This Court further finds that American Reliable's motion for sanctions pursuant to Federal Rule of Civil Procedure 11 should be denied because the defendants' motion for attorneys' fees was not filed for any improper purpose such as to harass or cause unnecessary delay or needless increase in the cost of litigation. Although this Court does not agree with the defendants' argument that attorneys' fees should be granted, this Court does not find that the defendants' argument was frivolous.

This Court further finds that defendants' motion to strike plaintiffs' reply memorandum in support of motion to compel arbitration should be denied because the plaintiffs' reply was timely filed.

Lastly, there being no objection to plaintiffs' motion for leave to file instanter a surreply memorandum in opposition to defendants' motion to dismiss, the plaintiffs' motion should be granted.

IV. Conclusion

For the reasons set forth above, the defendants' motion to dismiss is hereby GRANTED. This Court further finds that plaintiffs' motion to compel arbitration is DENIED; defendants' motion for attorneys' fees and expenses of litigation is DENIED; plaintiffs' motion for Rule 11 sanctions is DENIED; defendants' motion to strike is DENIED; and plaintiffs' motion for leave to file a surreply is GRANTED. It is further ORDERED that this action be DISMISSED and STRICKEN from the active docket of this Court.

IT IS SO ORDERED.

The Clerk is DIRECTED to transmit copies of this order to counsel of record herein. Pursuant to Federal Rule of Civil Procedure 58, the Clerk is DIRECTED to enter judgment on this matter.

DATED: March 18, 2002

/s/ FREDERICK P. STAMP, JR.
FREDERICK P. STAMP, JR.
UNITED STATES DISTRICT JUDGE